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United States
Circuit Court of Appeals

For the Ninth Circuit.

THOMAS S. NOWELL, WILLIS E. NOWELL,
THE NOWELL MINING AND MILLING
COMPANY, a Corporation, and THE AL-
ASKA NOWELL GOLD MINING COM-
PANY, a Corporation,

Appellants,

vs.

THE INTERNATIONAL TRUST COMPANY,
a Corporation, HENRY ENDICOTT, WILL-
IAM ENDICOTT, WALLACE HACKETT,
C. S. CORNING, R. McM. GILLESPE and
S. W. FAIRCHILD,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for
the District of Alaska, Division No. 1.

FILED
SEP 17 1912

Records of U. S. Circuit
Court of appeals
7x2

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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No. 717-A.

T. S. NOWELL et al.

vs.

INTERNATIONAL TRUST CO. et al.

Praeipie [for Record].

The Clerk will please prepare for transmission, on appeal to the U. S. Circuit Court of Appeals copy of the following:

- (1) Third Amended Complaint.
- (2) Demurrer Signed by Shackleford & Bayless and Ostrander & Donohoe Apr. 14/11 and filed *nunc pro tunc* as of Mch. 21/11. (Mch. 21/11.)
- (3) Decree.
- (4) Order substituting International Trust Co. as defendant in lieu of J. C. McBride, Recvr.
- (5) Petition for Allowance of Appeal.
- (6) Assignment of Errors.
- (7) Order Allowing Appeal.
- (8) Citation.
- (9) Bond on Appeal.
- (10) Order Extending Time to File Transcript.
- (11) Citation Issued May 3, 1912.

R. W. JENNINGS,

Atty. for Pltff.

[Endorsed]: "No. 717-A. T. S. Nowell et al. vs. International Trust Co. et al. Praeipie. Filed Feb. 3, 1912. E. W. Pettit, Clerk. By J. J. Clarke, Deputy." [1*]

*Page-number appearing at foot of page of original certified Record.

*In the United States District Court for Alaska,
Division Number One, at Juneau.*

No. 717-A.

THOMAS S. NOWELL, WILLIS E. NOWELL,
THE NOWELL MINING AND MILLING
COMPANY, a Corporation, and THE
ALASKA NOWELL GOLD MINING COM-
PANY, a Corporation,

Plaintiffs,

vs.

INTERNATIONAL TRUST COMPANY, a Cor-
poration, HENRY ENDICOTT, WILLIAM
ENDICOTT, WALLACE HACKETT, C. R.
CORNING, R. McM. GILLESPIE, and S. W.
FAIRCHILD,

Defendants.

Third Amended Bill of Complaint.

Now come the above-named plaintiffs and complaining of the above-named defendants for cause of action allege and show the Court and aver the truth to be as follows:

I.

That the plaintiff The Nowell Mining and Milling Company is a corporation duly organized and incorporated under the laws of the State of Maine; that the plaintiff The Alaska Nowell Gold Mining Company is a corporation duly organized and incorporated under the laws of the District of Alaska; that the Berner's Bay Mining and Milling Company is a corporation duly organized and incorporated under

the laws of the State of Maine; that on February 12, 1898, F. D. Nowell was appointed receiver of the said Berner's Bay Mining and Milling Company; that in July, 1907, this Court decreed that the appointment of the said F. D. Nowell as receiver of the said Berner's Bay Mining and Milling Company was void; that W. B. Hoggatt was appointed co-receiver by this Court on January 3, 1906; that John C. McBride was appointed on or about September 27, 1906, receiver of the said Berner's Bay Mining and Milling Company as the successor of the said F. D. Nowell; that the said John C. McBride was appointed receiver of the said company subsequently to the appearance on March 5, 1906, of the [2] said International Trust Company as a party in the cause entitled Decker Brothers against The Berner's Bay Mining and Milling Company et al., No. 603 on the docket of this court; that the said John C. McBride has been discharged as such receiver; that the defendant International Trust Company has been substituted in this cause in the place and stead of the said John C. McBride formerly the Receiver of the Berner's Bay Mining and Milling Company; that the defendant International Trust Company is a corporation duly organized and incorporated under the laws of the Commonwealth of Massachusetts.

II.

That heretofore, to wit, on the 18th day of January, 1906, F. D. Nowell and W. B. Hoggatt, as Receivers of the Berner's Bay Mining & Milling Co., filed a bill in equity in the District Court for the District of Alaska, Division No. 1, at Juneau, against these plain-

tiffs, which bill is in words and figures as follows, to wit:

No. 519-A.

“F. D. NOWELL and W. B. HOGGATT, Receivers
of the Property of the BERNER’S BAY
MINING & MILLING COMPANY (a Cor-
poration),

Plaintiffs,

vs.

THOMAS S. NOWELL, WILLIS E. NOWELL,
THE NOWELL MINING & MILLING
COMPANY (a Corporation), and THE
ALASKA NOWELL GOLD MINING COM-
PANY (a Corporation),

Defendants.

Bill of Complaint [in D. C. No. 519-A].

Now comes the plaintiffs in the above-entitled action, and, by leave of Court first had and obtained, complaining of the defendants above named, aver and show to the Court, as follows:

I.

That on the fifteenth day of December, 1897, there was begun, in the District Court, in and for the District of Alaska, an action wherein E. O. Decker and Jay Decker, copartners, doing business under the firm name and style of Decker Brothers, were plaintiffs, and the Berner’s Bay Mining & Milling Company, the Seward Gold Mining Company, the Northern Belle Gold Mining Company, and the Ophir Gold Mining Company, all corporations duly [3] organized and existing under and by virtue of the laws of the State of Maine, and which were then doing

business in the District of Alaska, were defendants. That said action was brought for the collection of certain debts and claims against said defendant corporations and said defendant corporations were alleged to be then and there insolvent.

II.

That said Court referred to in allegation I hereof was and is the predecessor of this Court. That said action above referred to was transferred by operation of law to this Court, and thence hitherto and now is pending in this Court, known and designated as Cause Number 603 upon the docket of this Court.

III.

That upon said fifteenth day of December, 1897, certain proceedings were had in said District Court for the appointment of a receiver in said action, and thereupon, and on said fifteenth day of December, 1897, said Court did appoint, by its order duly given and made on that day, one E. F. Cassel, receiver of the properties of said corporations, who were defendants in said action and, particularly, of the property and rights of the said The Berner's Bay Mining and Milling Company, one of the defendants therein. That said E. F. Cassel thereupon qualified as such receiver, and entered upon the discharge of his duties as such.

IV.

That thereafter and on the twelfth day of February, 1898, the said E. F. Cassel, after due proceedings had, resigned and was discharged as receiver herein, and the plaintiff, F. D. Nowell, was, by an order duly given and made, on said twelfth day of February,

1898, by said District Court of the District of Alaska, appointed receiver herein as successor of the said E. F. Cassel. That thereafter and on said twelfth day of February, 1898, said plaintiff, F. D. Nowell, gave bond and qualified and [4] entered into the discharge of his duties as receiver herein, and thence hitherto, during the pendency of said action, has continued to act as such receiver, and now is one of the receivers of this Court in said Cause Number 603.

V.

That thereafter, and on the third day of January, 1906, after certain proceedings had in that behalf, this Court did, by its order duly given and made on that day, appoint the plaintiff, W. B. Hoggatt as a coreceiver with the said F. D. Nowell, and thereafter and on the sixth day of January, 1906, the said plaintiff, W. B. Hoggatt, gave bond and qualified and entered into the discharge of his duties as such receiver, and thence hitherto and now is a receiver of this Court in said Cause Number 603.

VI.

That the said The Berner's Bay Mining & Milling Company, was, on the said fifteenth day of December, 1897, and now is, insolvent, and unable to pay its debts as they became due in the ordinary course of business. That at the time said action was commenced, to wit, on and prior to December 15, 1897, said The Berner's Bay Mining & Milling Company was indebted upon a mortgage upon the real property belonging to said corporation, hereinafter referred to and described, in the sum of Five Hundred Thousand Dollars (\$500,000.00), besides interest thereon,

due and unpaid for more than one year, and was also indebted in the further sum of more than One Hundred Thousand (\$100,000.00) Dollars in unsecured debts and liabilities. That said indebtedness far exceeded the market value of the mines, mining claims, and property owned by said The Berner's Bay Mining & Milling Company.

VII.

That on the third day of January, 1906, by its order duly [5] given and made upon that day, this Court granted to these plaintiffs permission to sue the defendants herein upon the cause of action hereinafter set forth.

VIII.

That on the twentieth day of October, 1892, The Berner's Bay Mining & Milling Company was organized and incorporated under the laws of the State of Maine, having its principal place of business at Portland, in the State of Maine. That its capital stock was fixed at One Million (\$1,000,000.00) Dollars, divided into ten thousand (10,000) shares at One Hundred (\$100.00) Dollars par value. That the defendant, Thomas S. Nowell, was chosen as its first president, and continued thereafter to act as such; that one Arthur L. Nowell, now deceased, a son of said defendant, Thomas S. Nowell, was, on the organization of said corporation, chosen as its first assistant treasurer, and, also as its first assistant clerk, and so continued to occupy said offices and act as such assistant treasurer and assistant clerk to said corporation continuously thereafter, during all the times covered by the transactions herein complained of. That said

Arthur L. Nowell died long prior to the commencement of this action, and prior to the discovery of the acts herein complained of. That the defendant, Willis E. Nowell, upon the organization of said corporation, and on the fourteenth day of November, 1892, received all its treasury stock, to wit, Nine Hundred Ninety-nine Thousand Six Hundred (\$999,600.00) Dollars, in the capital stock of said corporation in consideration of the transfer to it of certain mining claims, property rights, water rights, or other interests, known and described as follows: Hartford Lode Claim, Seward Number One Millsite, Bear Number Two Millsite, Banner Lode Claim, Poor Richard Lode Claim, Thomas Lode Claim, Cumberland Lode Claim, Northwest Lode Claim, Esmeralda Lode Claim, Snow Flake Lode Claim, Eclipse Lode Claim, Excelsior Lode Claim, Comet [6] Lode Claim, Comet Extension Lode Claim, Last Chance Lode Claim and Comet Millsite.

Also an undivided two-thirds interest in the following mining properties: The Northern Belle, Seward Lode Claim, Seward Number Two Lode, Elmira Lode Claim, Kensington Lode Claim, Bear Lode Claim, Eureka Lode Claim, Savage Lode Claim, Yellow Jacket Lode Claim.

Also a five-sixth undivided interest in the Ophir Lode and the right of the said Willis E. Nowell to acquire the remaining undivided interests in said claims on payment of Five Thousand (\$5,000) Dollars. That all said mining claims, mill sites and water rights and property rights so acquired from said defendant, Willis E. Nowell, were and are situ-

ated near Berner's Bay, in the District of Alaska, and, subsequently, became known as the Nowell Gold Mines at Seward City, Berner's Bay, Alaska.

That on the twenty-sixth day of July, 1893, the said The Berner's Bay Mining & Milling Company, acquired the following three lode claims, to wit, Harvard, American, and Columbian; all situated in the vicinity of the claims and properties theretofore acquired and then owned by said corporation near Berner's Bay, as aforesaid. That all of said properties were operated under one management, and were being developed as a single enterprise.

IX.

That said The Berner's Bay Mining & Milling Company, at the date of its organization, to wit, on the fourteenth day of November, 1892; having exhausted all its capital stock, except four shares then owned by Thomas S. Nowell, Arthur L. Nowell, George M. Nowell and Albert C. Howard, one share each, in the purchase of said property so situated as aforesaid, in order to develop the same and in order to prosecute the enterprise of said corporation in the District of Alaska, at Berner's Bay aforesaid, issued and caused to be issued two hundred (200) bonds of One [7] Thousand (\$1,000.00) Dollars each, secured by a first mortgage on said property, and thereafter said corporation executed and delivered to the International Trust Company, a corporation organized and existing under the laws of the State of Massachusetts, a mortgage, or deed of trust, dated November 15, 1892, conditioned for the payment of said bonds and to secure the payment thereof, and

said mortgage or deed of trust was recorded in Book O, page 356, in the office of the Recorder of the Harris Mining District, in Alaska, wherein said property was situated and the same became and constituted a first mortgage lien upon said real property hereinabove described. That the defendant, Thomas S. Nowell, is the father of the defendant Willis E. Nowell, and the above-named Arthur L. Nowell, now deceased, and George M. Nowell.

X.

That during all the times herein alleged the said defendants, Thomas S. Nowell and Willis E. Nowell, resided or sojourned during the principal portion of each year in the District of Alaska, and at and in the vicinity of said mining property. That they both were perfectly familiar with the physical location, condition and situation of said mining properties hereinabove and hereinafter referred to and described, and were the active promoters of the mining enterprise conducted in Alaska, under and in the name of the Berner's Bay Mining & Milling Company. That from the organization of said corporation last named, until on or about the month of June, 1896, said mining enterprise at Berner's Bay as aforesaid was conducted by said corporation, The Berner's Bay Mining & Milling Company, under the management and control of the said defendants, Thomas S. Nowell and Willis E. Nowell. That large sums of money were spent in the development of said properties, derived from the sale of said mortgage bonds. That during said period, as plaintiffs are informed and believe and aver, no profit was derived

from the prosecution of the development [8] of said properties, and no dividends were paid upon the capital stock of said corporation, The Berner's Bay Mining & Milling Company. That during said period last aforesaid, to wit, four years prior to the month of June, 1896, said defendants, Thomas S. Nowell and Willis E. Nowell, while officers of the said corporation, the Berner's Bay Mining & Milling Company, and while conducting said enterprise for said corporation at Berner's Bay aforesaid, and while there was confided to them the proper development and management of said properties hereinabove described, acquired, by location and purchase, fifteen undeveloped, lode, mining claims hereinafter named, situated within the same mineral zone in which were situated the mining claims hereinbefore described, belonging to the said Berner's Bay Mining & Milling Company; some of which were so situated as to join and connect with the properties of said corporation last named; and some of which were so situated upon and in the same mountain, at a higher elevation and in such a natural position as to be more advantageously worked and developed from the drifts, cross-cuts, headings, and actual work underground then completed by said company last aforesaid. That three of said properties so acquired by said defendants Thomas S. Nowell and Willis E. Nowell, aforesaid, to wit, Northern Light or Johnson, Northern Light Extension Number One, or Emma, Northern Light Extension Number Two, were known as the Johnson Group, or Johnson Mines. That the remaining twelve claims as hereinafter specified were

located immediately in connection with the said Johnson Group and the Berner's Bay properties, and could be advantageously worked in developing the Johnson Group from the underground workings of the Berner's Bay properties. That some of them, to wit, Seward Extension, Columbian East Extension, Bear Extension, Savage Extension and Columbian West Extension, were located adjoining the claims and properties then owned by said corporation last above named and were located upon [9] lodes and ledges then being worked in the enterprise known as the Nowell Gold Mines, which were then in charge of said defendant last above named.

XI.

That on or about the month of June, 1896, the said defendant Thomas S. Nowell, on behalf of himself and the defendant Willis E. Nowell, represented to the stockholders, creditors and persons interested in the success of the Berner's Bay Mining & Milling Company, the advantages to that corporation of the acquisition and purchase of those certain adjoining and adjacent properties, then owned by them, situated, some adjoining, and some immediately in the vicinity of the properties of said corporation, then being worked and developed by said corporation last aforesaid, at Berner's Bay, Alaska, as aforesaid. That the said defendant, as aforesaid, represented to said stockholders, residing at Boston and vicinity, who were without any personal knowledge of the physical situation and condition of said property, what advantages would accrue to said corporation, the Berner's Bay Mining & Milling Company, by

the acquisition of those certain fifteen mining claims and properties then owned by them, and particularly three certain claims known as the Johnson Group, then known to be of great value, and the twelve other claims immediately in connection with the said Johnson Group and the Berner's Bay properties, then owned by said corporation; also the advantages of increasing the capital stock of said corporation for the purpose of purchasing said additional mining claims and properties and incurring additional indebtedness for the prosecution, development and advantage of said enterprise. That said defendant, Thomas S. Nowell, on behalf of himself and his said son, the defendant Willis E. Nowell, then and there represented that they owned and would sell and convey to said corporation, The Berner's Bay Mining & Milling Company, fifteen mining claims, including the Johnson [10] Group, then owned by them as aforesaid, for and in consideration of the issue to them of the sum of One and One-half Millions (\$1,500,000.00) Dollars of capital stock of said corporation, and proposed that an additional bonded indebtedness in the sum of Three Hundred Thousand (\$300,000.00) Dollars be incurred by said corporation, The Berner's Bay Mining & Milling Company, that the proceeds arising therefrom might be used as a working capital to develop said properties.

XII.

That in pursuance of said offer, it was agreed that a special meeting of the stockholders of the Berner's Bay Mining & Milling Company should be called to acquire said property upon the said terms proposed.

That prior to the twenty-fourth day of June, 1896, the said defendant, Thomas S. Nowell, caused a notice of stockholders' meeting of the Berner's Bay Mining & Milling Company to be given, wherein and whereby it was proposed to sell to said corporation the following fifteen mining claims, to wit: Northern Light Extension Number One or Emma, Northern Light or Johnson, Portsmouth, Seward Extension, Columbian East Extension, Bear Extension, Savage Extension, Lucky Boy, Columbia West Extension, Selkirk, Rustler, Alaska Maid, Acropolis, Northern Star, Northern Light Number Two; and that in the said notice of stockholders' meeting it was proposed to increase the capital stock of the said The Berner's Bay Mining & Milling Company from One Million (\$1,000,000.00) Dollars to Two Million Five Hundred Thousand (\$2,500,000.00) Dollars, for the purpose of acquiring said properties; and also to increase the bonded indebtedness of said company from Two Hundred Thousand (\$200,000.00) Dollars to Five Hundred Thousand (\$500,000.00) Dollars. That the said notice of meeting was signed by the said defendant, Thomas S. Nowell, as president, and, in pursuance thereto, and on the twenty-fourth day of June, 1896, a meeting of the stockholders of the Berner's Bay Mining & Milling Company was held at Number 30 Exchange Street, in the City of Portland, State of Maine, at which meeting it [11] was voted to increase the capital stock of said corporation from One Million (\$1,000,000.00) Dollars to Two Million Five Hundred Thousand (\$2,500,000.00) Dollars, and all of

the proposed increase of capital stock, to wit, One Million Five Hundred Thousand (\$1,500,000.00) Dollars, was voted to be delivered to the said defendants, Thomas S. Nowell and Willis E. Nowell, to wit, Five Hundred Thousand (\$500,000.00) Dollars thereof to the defendant, Thomas S. Nowell, and One Million (\$1,000,000.00) Dollars thereof to the defendant, Willis E. Nowell.

XIII.

That thereafter The Berner's Bay Mining & Milling Company paid to said defendants, Thomas S. Nowell and Willis E. Nowell, the full consideration and purchase price for said fifteen mining claims, as hereinabove in paragraph XII hereof alleged, and said company issued to the said defendant, Thomas S. Nowell, five thousand (5,000) shares of the capital stock of said corporation at One Hundred (\$100.00) Dollars per share, and, to the said defendant, Willis E. Nowell, ten thousand (10,000) shares of the capital stock of the said corporation at One Hundred (\$100.00) Dollars per share. That these plaintiffs aver the fact to be, that the true intent and meaning of the proceedings at the stockholders' meeting was to sell to the said Berner's Bay Mining & Milling Company, in connection with said other claims, the said Northern Light, Northern Light Number One, and Northern Light Number Two lode mining claims, constituting the Johnson Group; and your petitioners further allege that the said three claims then constituted and do now constitute the principal value of the fifteen claims so offered for sale pursuant to the aforesaid notice of meeting.

XIV.

These plaintiffs are informed and believe, and upon such [12] information and belief, aver the truth to be, that after the date of said stockholders' meeting, and after said sale of said fifteen mining claims to said corporation, as aforesaid, by the insertion in an offer of sale recorded in the minutes of the said stockholders' meeting of the words "last twelve," the true intent and meaning of said transaction was wrongfully and fraudulently changed and altered. That during the times of the acts herein complained of, the books of said corporation, including the record books and records, papers and proceedings of said corporation, were in the custody and control of said defendant, Thomas S. Nowell, and the said assistant treasurer and assistant clerk of said corporation, the said Arthur L. Nowell, deceased, at the general offices of said corporation, situated in Boston, Massachusetts, where the eastern business and financial transactions of said corporation were conducted; that thereafter and pursuant to a scheme and conspiracy on the part of the said defendants, Thomas S. Nowell and Willis E. Nowell, to defraud the said Berner's Bay Mining & Milling Company, and its creditors and stockholders, the said Thomas S. Nowell and Willis E. Nowell failed, neglected and refused to convey to the said corporation, The Berner's Bay Mining & Milling Company, the said three claims known as the Johnson Group, to wit, Northern Light or Johnson, Northern Light Extension Number One or Emma; and Northern Light Extension Number Two.

XV.

That since the twenty-fourth day of June, 1896, said defendants, Thomas S. Nowell and Willis E. Nowell and Nowell Mining & Milling Company, have held the legal title in and to said three lode mining claims above described, in trust for the use and benefit of the said The Berner's Bay Mining & Milling Company, its stockholders and creditors. [13]

XVI.

That some time prior to the twenty-fifth day of May, 1900, the said defendants, Thomas S. Nowell and Willis E. Nowell, in pursuance of said conspiracy to defraud the said corporation, The Berner's Bay Mining & Milling Company, out of said three mining claims known as the Johnson Group, as hereinabove alleged and described, organized, or caused to be organized, under the laws of the State of Maine, a corporation known as the Nowell Mining and Milling Company, one of the defendants herein. That said corporation was so organized as aforesaid, with a capital stock of One Million (\$1,000,000.00) Dollars, consisting of ten thousand (10,000) shares at One Hundred (\$100.00) Dollars per share. That the said defendant, Thomas S. Nowell, was chosen its first president, and thence hitherto has continued as such. That since the organization of said corporation, plaintiffs are informed and believe that the same has been controlled and managed by said defendants, Thomas S. Nowell, who holds one share of stock, and Willis E. Nowell, who holds or controls nine thousand nine hundred and ninety-seven (9997) shares of stock.

XVII.

That at some time between the date of the organization of said defendant, Nowell Mining and Milling Company, and prior to the tenth day of December, 1902, the said defendants, Thomas S. Nowell and Willis E. Nowell, transferred and conveyed or pretended to transfer and convey to said defendant Nowell Mining and Milling Company, the said Johnson Group of claims, to wit: The Northern Light or Johnson, Northern Light Extension Number One or Emma, and the Northern Light Extension Number Two; but said transfer or conveyance was without consideration, and with a full knowledge and notice on the part of said defendant corporation, Nowell Mining and Milling Company, of all the acts, facts and transactions in connection with the sale of said properties [14] to The Berner's Bay Mining & Milling Company, and with full notice and knowledge of the rights, equities and claims of said The Berner's Bay Mining & Milling Company, its stockholders and creditors, in and to said properties.

That these plaintiffs are further informed and believe and aver that, in pursuance of said conspiracy and to carry out the same, and in order to defraud and deprive said corporation, The Berner's Bay Mining & Milling Company, of said three mining claims last above named, the said defendants, Thomas S. Nowell and Willis E. Nowell, caused an application and the necessary preliminary steps and proofs to be taken and made in the United States Land Department to secure a United States patent to said claims, to be issued to the said defendant, Nowell

Mining and Milling Company. That said application, preliminary steps and proofs and all said proceedings so taken as aforesaid were taken and carried on and conducted without the knowledge of or notice to these plaintiffs, or either of them, as receivers, or their predecessors in interest, and the same were had entirely ex parte by the said Nowell Mining and Milling Company and the said defendants, Thomas S. Nowell and Willis E. Nowell, and they transpired and these patents therefor were issued prior to any knowledge on the part of these receivers or their predecessors in interest of the facts and acts herein complained of; that on said tenth day of December, 1902, the United States of America issued to said defendant, Nowell Mining & Milling Company its letters patent, and granted to it the said three mining claims bounded and described as follows:

Northern Light: Beginning at corner No. 1, from which U. S. Mineral Monument No. 1 bears south 25 degrees, 3 minutes, west, 3.983 feet distant, and mouth of a joint tunnel bears north 39 degrees 6 minutes, west, 1,789.3 feet distant; thence north 41 degrees 15 minutes east, 460 feet to witness corner No. 2; [15] 600 feet to corner No. 2; thence north 48 degrees 45 minutes west, 1450 feet to witness corner to corner No. 31, 1500 feet to corner No. 3; thence south 41 degrees 15 minutes west, 300 feet to discovery point; 600 feet to corner No. 4; thence south 48 degrees 45 minutes east, 1500 feet to corner No. 1, the place of beginning.

Northern Light Extension No. 1 or Emma: Begin-

ning at corner No. 1, from which U. S. Mineral Monument bears south 45 degrees 59 minutes west, 3,832 feet distant; thence north 41 degrees 15 minutes east 600 feet to corner No. 2; thence north 48 degrees 45 minutes west, 1105 feet to witness corner to corner No. 3, 1,298 feet to corner No. 3, identical with corner No. 2 of Northern Light; thence south 41 degrees 15 minutes west 600 feet to corner No. 4, identical with corner No. 1 of said Northern Light; thence south 48 degrees 45 minutes east 1,297 feet to corner No. 1, the place of beginning.

Northern Light Extension No. 2: Beginning at corner No. 1, identical with corner No. 4, of Northern Light, from which U. S. Mineral Monument No. 1 bears south 6 degrees 56 minutes west 4,638.4 feet distant, and the mouth of a joint tunnel bears north 6 minutes west 399.6 feet distant; thence north 48 degrees 45 minutes west 807 feet to witness corner to corner No. 2; 1,500 feet to corner No. 2; thence north 41 degrees 15 minutes east 600 feet to corner No. 3; thence south 48 degrees 45 minutes east 357.6 feet to witness corner to corner No. 3; 1,125.6 feet to witness corner to corner No. 4; 1500 feet to corner No. 4; thence south 41 degrees 15 minutes west 600 feet to corner No. 1, the place of beginning; said lot No. 380 containing 59.19 acres, more or less.

That said defendant Nowell Mining and Milling Company, took said patent and acquired said lands, and now holds the same, with full knowledge and notice of the transactions hereinabove [16] alleged in connection with the sale of said mining properties to The Berner's Bay Mining & Milling

Company, and said defendant, Nowell Mining and Milling Company, now holds the naked legal title to said claims in trust for the use and benefit of said corporation, the Berner's Bay Mining & Milling Company, its stockholders and creditors.

XVIII.

That the defendant, Alaska Nowell Gold Mining Company, is a corporation, organized and existing under the laws of the District of Alaska. That said defendant asserts some claim or interest in said claims known as the Northern Light, Northern Light Extension Number One or Emma, and Northern Light Extension Number Two, either as purchaser or successor in interest to the defendant Nowell Mining and Milling Company, but said claim or interest is without right and subordinate to and subject to the rights of said The Berner's Bay Mining and Milling Company.

WHEREFORE, plaintiffs pray that this Court decree:

1. That those three certain mining claims, as in allegation XVII of this complaint more particularly bounded and described known as the Johnson Group, called and named the Northern Light or Johnson, Northern Light Extension Number One or Emma, and Northern Light Extension Number Two, were sold by the defendants, Thomas S. Nowell and Willis E. Nowell, to The Berner's Bay Mining & Milling Company, a corporation, in the month of June, 1896, and that said corporation paid to said defendants the full and agreed consideration and purchase price therefor.

2. That said three mining claims were transferred to the Nowell Mining & Milling Company, one of the defendants herein, by said defendants, Thomas S. Nowell and Willis E. Nowell, with full knowledge and notice of the rights of said The Berner's Bay Mining and Milling Company, a corporation, in and to said property. [17]

3. That defendant, Nowell Mining and Milling Company, a corporation, holds said three mining claims under a patent from the United States of America, dated December 10, 1902, in trust for the use and benefit of said The Berner's Bay Mining and Milling Company.

4. That defendant, Nowell Mining and Milling Company, a corporation, do convey to the said The Berner's Bay Mining and Milling Company, a corporation, the record title to said three mining claims within such time as this court shall direct, or, failing to do so, that a Master, appointed by this Court in that behalf, do make such conveyance, and that such conveyance, when made, be delivered to these plaintiffs as receivers of the property and rights of the said The Berner's Bay Mining & Milling Company, for the benefit of said corporation, its creditors and stockholders, and that these plaintiffs enter into possession and take into their custody and control, said three mining claims, the Northern Light or Johnson, Northern Light Extension Number One or Emma, and Northern Light Extension Number Two; to be held by them as such receivers in Cause 603, now pending in this court, for the benefit of said corporation, The Berner's Bay Mining and

Milling Company, its creditors and stockholders, subject to the orders of this Court.

5. And for such other, further, different, general relief as the nature of the case and the principles of equity require and for costs of this action.

SHACKLEFORD & LYONS and
JOHN J. BOYCE,

Attorneys for Plaintiffs.

United States of America,
District of Alaska,—ss.

W. B. Hoggatt, being duly sworn, deposes [18] and says: That he is one of the plaintiffs in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof, and that the same is true as he verily believes.

W. B. HOGGATT.

Subscribed and sworn to before me this 21st day of Feby., 1906.

[Clerk's Seal]

C. C. PAGE,

Clerk District Court for Division No. 1, Alaska.

Verified as per order of Court Feby. 21st, 1906.

C. C. PAGE,

Clerk."

III.

That thereafter, on the 26th day of April, 1906, the defendant, Henry Endicott, by leave of the Court, filed his bill of intervention in said cause, which bill is in words and figures as follows, to wit:

No. 519-A.

“F. D. NOWELL and W. B. HOGGATT, Receivers
of the Property of THE BERNER’S BAY
MINING AND MILLING COMPANY, a
Corporation,

Plaintiffs,

vs.

THOMAS S. NOWELL, WILLIS E. NOWELL,
THE NOWELL MINING AND MILLING
COMPANY, a Corporation, and THE
ALASKA NOWELL GOLD MINING COM-
PANY, a Corporation,

Defendants.

Petition of Intervention [in D. C. No. 519-A].

Comes now the petitioner herein, Henry Endicott,
and, after leave of the Court first had and obtained,
files this his bill of intervention in the above-entitled
action, and avers and shows to the Court as follows:

I.

That at all the times herein mentioned your peti-
tioner was, and now is, a stockholder of The Ber-
ner’s Bay Mining and Milling [19] Company.

II.

That on the fifteenth day of December, 1897, there
was begun in the District Court in and for the Dis-
trict of Alaska, an action wherein E. O. Decker and
Jay Decker, copartners, doing business under the
firm name and style of Decker Brothers, were plain-
tiffs and the Berner’s Bay Mining and Milling
Company, the Seward Gold Mining Company, The
Northern Belle Gold Mining Co. and the Ophir Gold
Mining Company, all corporations duly organized

and existing under and by virtue of the laws of the State of Maine, and which was then doing business in the District of Alaska, were defendants. That said action was brought for the collection of certain debts and claims against said defendant corporations, and said defendant corporations were alleged to be then and there insolvent.

III.

That said Court referred to in allegation I thereof was and is predecessor of this Court. That said action above referred to was transferred by operation of law to this Court, and thence hitherto and now is pending in this court, known and designated as cause No. 603 upon the docket of this court.

IV.

That upon said fifteenth day of December, 1897, certain proceedings were had in said District Court for the appointment of a receiver in said action, and thereupon, and on said fifteenth day of December, 1897, said court did appoint, by its order duly given and made on that day, one E. F. Cassel, receiver of the properties of said corporations, who were defendants in said action, and particularly of the property and rights of the said The Berner's Bay Mining and Milling Company, one of the defendants therein. That said E. F. Cassel thereupon qualified as such receiver and entered upon the discharge of his duties as such. [20]

V.

That thereafter, and on the twelfth day of February, 1898, the said E. F. Cassel, after due proceedings had, resigned and was discharged as receiver

herein, and the plaintiff, F. D. Nowell, was, by order, duly given and made on said twelfth day of February, 1898, appointed receiver herein as successor of the said E. F. Cassel. That thereafter and on said twelfth day of February, 1898, said plaintiff F. D. Nowell gave bond and qualified and entered into the discharge of his duties as receiver herein, and thence hitherto, during the pendency of said action, has continued to act as such receiver, and now is one of the receivers of this court in said cause No. 603.

VI.

That the said Berner's Bay Mining and Milling Company was on said fifteenth day of December, 1897, and now is, insolvent and unable to pay its debts as they become due in the ordinary course of business. That at the time said action was commenced, to wit, on and prior to December 15, 1897, said Berner's Bay Mining and Milling Company was indebted upon a mortgage upon real property belonging to said corporation, hereinafter referred to and described, in the sum of five hundred thousand dollars, besides interest thereon, due and unpaid for more than one year, and was also indebted in the further sum of more than one hundred thousand dollars in unsecured debts and liabilities. That said indebtedness far exceeded the market value of the mines, mining claims and property owned by said The Berner's Bay Mining and Milling Company.

VII.

That on the twentieth day of October, 1892, The Berner's Bay Mining and Milling Company was organized and incorporated under the laws of the

State of Maine, having its principal place of business at Portland, in said State of Maine. That its capital stock was fixed at one million dollars, divided into [21] ten thousand shares at one hundred dollars, par value. That the defendant, Thomas S. Nowell, was chosen as its first president and continued thereafter to act as such; that one Arthur L. Nowell, now deceased, a son of said defendant, Thomas S. Nowell, was, on the organization of said corporation, chosen as its first assistant treasurer and also as its first assistant clerk, and so continued to occupy said offices and act as such assistant treasurer and assistant clerk to said corporation continuously thereafter during all the times covered by the transactions herein complained of. That said Arthur L. Nowell died long prior to the commencement of this action and prior to the discovery of the acts herein complained of. That the defendant Willis E. Nowell, upon the organization of said corporation, and on the fourteenth day of November, 1892, received all its treasury stock, to wit, Nine Hundred and Ninety-nine Thousand Six Hundred (999,600) Dollars, in the capital stock of said corporation in the consideration of the transfer to it of certain mining claims, property rights, water rights and other interests, known and described as follows: Hartford Lode Claim, Seward Number One Millsite, Bear Number Two Millsite, Banner Claim, Poor Richard Lode Claim, Thomas Lode Claim, Cumberland Lode Claim, Northwest Lode Claim, Esmeralda Lode Claim, Snowflake Lode Claim, Eclipse Lode Claim, Excelsior Lode Claim, Comet Lode Claim, Comet Ex-

tension Lode Claim, *Comet Extension Lode Claim*, Last Chance Lode Claim and Comet Millsite.

Also an undivided two-thirds interest in the following mining properties: The Northern Belle, Seward Lode Claim, Seward Number Two Lode Claim, Elmira Lode Claim, Kensington Lode Claim, Bear Lode Claim, Eureka Lode Claim, Savage Lode Claim and Yellow Jacket Lode Claim.

Also a five-sixth undivided interest in the Ophir Lode; and the right of the said Willis E. Nowell to acquire the remaining undivided interest in said claims on payment of five thousand dollars. [22]

That all said mining claims, millsites and water rights and property rights so acquired from said defendant, Willis E. Nowell, were and are situated near Berner's Bay in the District of Alaska and subsequently became known as the Nowell Gold Mines at Seward City, Berner's Bay, Alaska.

That on the twenty-sixth day of July, 1903, the said Berner's Bay Mining and Milling Company acquired the following three lode mining claims, to wit, Harvard, American and Columbian; all situated in the vicinity of the claims and properties theretofore acquired and then owned by said corporation near Berner's Bay as aforesaid. That all of said properties were operated under one management and were being developed as a single enterprise.

VIII.

That said The Berner's Bay Mining and Milling Company, at the date of its organization, to wit, on the fourteenth day of November, 1892, having exhausted all its capital stock, except four shares then

owned by Thomas S. Nowell, Arthur L. Nowell, George M. Nowell and Albert C. Howard, one share each, in the purchase of said property so situated as aforesaid, in order to develop the same, and in order to prosecute the enterprise of said corporation in the District of Alaska, at Berner's Bay aforesaid, issued and caused to be issued two hundred bonds of one thousand dollars each, secured by a first mortgage on said property and thereafter, said corporation executed and delivered to the International Trust Company, a corporation, organized and existing under the laws of the State of Massachusetts, a mortgage or deed of trust, dated November 15, 1892, conditioned for the payment of said bonds and to secure the payment thereof and said mortgage or deed of trust was recorded in Book O, page 356, in the office of the Recorder of the Harris Mining District in Alaska, wherein said property was situated, and the same became and constituted a first mortgage lien upon said real property [23] hereinabove described. That the defendant, Thomas S. Nowell, is the father of the defendant, Willis E. Nowell, and the above-named Arthur L. Nowell, now deceased, and George M. Nowell.

IX.

That during all the times herein alleged the said defendants, Thomas S. Nowell and Willis E. Nowell, resided or sojourned during the principal portion of each year in the District of Alaska and at and in the vicinity of said mining property. That they both were perfectly familiar with the physical location, condition and situation of said mining prop-

erties hereinabove and hereinafter referred to and described, and were the active promoters of the mining enterprise conducted in Alaska under and in the name of The Berner's Bay Mining and Milling Company. That from the organization of the said corporation last named, until on or about the month of June, 1896, said mining enterprise at Berner's Bay as aforesaid was conducted by said corporation, The Berner's Bay Mining and Milling Company, under the management and control of the said defendants Thomas S. Nowell and Willis E. Nowell. That large sums of money were spent in the development of said properties, derived from the sale of said mortgage bonds. That during said period, as your petitioner is informed and believes and avers, no profit was derived from the prosecution of the development of said properties and no dividends were paid upon the capital stock of said corporation, The Berner's Bay Mining and Milling Company. That during said period last aforesaid, to wit, four years prior to the month of June, 1896, said defendants Thomas S. Nowell and Willis E. Nowell, while officers of the said corporation, The Berner's Bay Mining and Milling Company, and, while conducting said enterprise for said corporation at Berner's Bay aforesaid, and while there was confided to them the proper development and management of said properties, hereinabove described, acquired by location and purchase fifteen undeveloped lode mining [24] claims, hereinafter named, situated within the same mineral zone in which were situated the mining claims hereinbefore

described belonging to said The Berner's Bay Mining and Milling Company, some of which was so situated as to join and connect with the properties of said corporation last named; and some of which were so situated upon and in the same mountain, at a higher elevation and in such a natural position as to be more advantageously worked and developed from the drifts, cross-cuts, headings and actual work underground then completed by said company last aforesaid. That three of said properties so acquired by said defendants, Thomas S. Nowell and Willis E. Nowell, aforesaid, to wit, Northern Light or Johnson, Northern Light Extension Number One or Emma, and Northern Light Extension Number Two, were known as the Johnson Group or Johnson Mines. That the remaining twelve claims as hereinafter specified, were located immediately in connection with the said Johnson Group and the Berner's Bay properties, and could be advantageously worked in developing the Johnson Group from the underground workings of the Berner's Bay properties. That some of them, to wit, Seward Extension, Columbian East Extension, Bear Extension, Savage Extension and Columbian West Extension, were located adjoining the claims and properties then owned by said corporation last above named, and were located upon lodes and ledges then being worked in the enterprise known as the Nowell Gold Mines, which were then in charge of said defendant last above named.

X.

That on or about the third day of June, 1896, the

said defendant, Thomas S. Nowell, presented a proposition in writing to your petitioner wherein and whereby he, the said Thomas S. Nowell, stated that the holders of forty-six of the first mortgage bonds of the Berner's Bay Mining and Milling Company were desirous of disposing of their said bonds, and also the holders of [25] two hundred and ninety-two shares of the capital stock of the said Berner's Bay Mining and Milling Company, of the par value of One Hundred Dollars each, were desirous of disposing of the same; that the par value of the bonds and stock was \$75,200.00 and accrued interest on said bonds at the date was \$1,878.33, aggregating the sum of \$77,078.33; and he, the said Thomas S. Nowell, further stated that the said bonds and stocks could be purchased at that time for the sum of \$47,948.35; said defendant, Thomas S. Nowell further stated that the holders of said forty-six bonds were not willing to extend the time for the payment of such bonds, and were insisting upon a foreclosure of the mortgage given to secure said bonds; said defendant, Thomas S. Nowell further stated that if your petitioner could raise \$27,948.35, he, the said Thomas S. Nowell, could raise the other \$20,000.00 for the purchase of the bonds and stock as aforesaid; and he, the said Thomas S. Nowell, further stated to your petitioner that he was desirous of increasing the capital stock of the Berner's Bay Mining and Milling Company to \$2,500,000.00, and to increase the bonded indebtedness of said company to \$500,000.00, and to set aside \$500,000.00 of said increase if said capital stock to be used, so far as it

would be found necessary, for the purpose of aiding in the disposal and sale of the additional \$300,000.00 in bonds, which he, the said Thomas S. Nowell, desired to be issued; that the balance of said increase of capital stock was to be paid over to the said Thomas S. Nowell, or anyone whom he might name; said Thomas S. Nowell further stated that in consideration of your petitioner raising this said sum of \$27,948.35, for the purpose of purchasing said forty-six bonds and said two hundred and ninety-two shares of the capital stock of said company, and in consideration of the increase of the capital stock of the said Berner's Bay Mining and Milling Company, and the increase of its bonded indebtedness, [26] as above stated, he, the said Thomas S. Nowell, would turn and convey to the said Berner's Bay Mining and Milling Company what are known as the Northern Light or Johnson Lode Mining Claim, The Northern Light Extension No. 1, or Emma, Lode Mining Claim, and the Northern Light Extension No. 2, comprising the Johnson Group; which said mines are located in the Berner's Bay Mining District, District of Alaska, which said Thomas S. Nowell, represented to be of great value; said Thomas S. Nowell further agreed to convey, or cause to be conveyed, twelve other lode mining claims, situated in Berner's Bay Mining District, District of Alaska, more particularly described as follows, to wit: Portsmouth, Seward Extension, Columbian East Extension, Bear Extension, Savage Extension, Lucky Boy, Columbian West Extension, Selkirk, Rustler, Alaska Maid, Acropolis and Northern Star,

which he stated could be worked successfully in connection with said Johnson Group, and the mines then owned by the said Berner's Bay Mining and Milling Company; and said Thomas S. Nowell represented said Johnson Group of mines to be more valuable than the holdings of the Berner's Bay Mining and Milling Company at that time, and the said Thomas S. Nowell did not pretend that other said twelve claims hereinbefore named were of any great value; that your petitioner relying on said representations of said Thomas S. Nowell, and believing the same to be true, and believing that said Thomas S. Nowell intended to convey or cause to be conveyed said Johnson Group of mines to the Berner's Bay Mining and Milling Company, and relying upon said representations by said Thomas S. Nowell that he would cause said Johnson Group to be so conveyed to the said Berner's Bay Mining and Milling Company, purchased eight of said forty-six bonds for himself, and induced and persuaded William Endicott, Aaron Hobart, George Thatcher, Chas. H. Sawyer, and Wallace Hackett to purchase thirty-three of said bonds; that the number of bonds so [27] purchased by said last named parties and your petitioner aggregated forty-one, and one Guy Lampkin purchased the remaining five of said bonds; that your petitioner and all of said parties purchased at said time said two hundred and ninety-two shares of the capital stock of said Berner's Bay Mining and Milling Company, and on or about June 15th, 1896, paid for said bonds and said stock the sum of \$47,-948.35, each person paying his *pro rata* share there-

for in accordance with the number of bonds so purchased; that your petitioner was induced to purchase said bonds and said stock by reason of the representations of the said Thomas S. Nowell that he would convey or cause to be conveyed to the said Berner's Bay Mining and Milling Company the said Johnson Group of mines, together with said other twelve claims; that in pursuance of said offer by said Thomas S. Nowell to convey or cause to be conveyed to the Berner's Bay Mining and Milling Company the said Johnson Group of mines, together with said twelve other mining claims, hereinbefore described, and in pursuance of said plan and proposition of said Thomas S. Nowell, to increase the capital stock of said corporation from One Million Dollars to Two and One-half Million Dollars, and the bonded indebtedness from \$200,000.00 to \$500,000.00, he, the said Thomas S. Nowell, caused a notice of stockholders' meeting of the Berner's Bay Mining and Milling Company to be given, wherein and whereby it was proposed to sell to said corporation the following described mining claims, to wit: Northern Extension No. 1, or Emma, Northern Light or Johnson, Portsmouth, Seward Extension, Columbian East Extension, Bear Extension, Savage Extension, Lucky Boy, Columbian West Extension, Selkirk, Rustler, Alaska Maid, Acropolis, North Star, and Northern Light No. 2; and that in the said notice of stockholders' meeting it was proposed to increase the capital stock of the said Berner's Bay Mining and Milling Company from \$1,000,000.00 to \$2,500,000.00 [28] for the purpose of acquiring said

properties, and also to increase the bonded indebtedness of said company from \$200,000.00 to \$500,000.00; that the said notice of said meeting was signed by the said Thomas S. Nowell as President, and in pursuance thereto and on the 24th day of June, 1896, a meeting of the stockholders of the Berner's Bay Mining and Milling Company was held at No. 30 Exchange Street, in the city of Portland, State of Maine; at which meeting it was voted to increase the capital stock of said corporation from One Million to Two and One-half Million Dollars, and all of the proposed increase of capital stock, to wit, \$1,500,000.00 was voted to be delivered to the said defendants Thomas S. Nowell and Willis E. Nowell, to wit, \$500,000.00 thereof to the defendant Thomas S. Nowell, and One Million Dollars thereof to the defendant Willis E. Nowell; that your petitioner was not present at said stockholders' meeting of the 24th day of June, 1896, as he had, prior to that date, delivered his proxy to said Thomas S. Nowell, which said proxy was so delivered to the said Thomas S. Nowell, with the understanding between the said Thomas S. Nowell and your petitioner that all of said fifteen claims, including the Johnson Group of mines, were to be conveyed or caused to be conveyed to the said Berner's Bay Mining and Milling Company by said Thomas S. Nowell, and that the capital stock of said company should be increased from One Million to Two and One-half Million Dollars, and the bonded indebtedness be increased from \$200,000.00 to \$500,000.00; that your petitioner would not have delivered his proxy to the said Thomas S.

Nowell to be voted at said meeting of stockholders of said Berner's Bay Mining and Milling Company had he not relied upon Thomas S. Nowell's promise to convey or cause to be conveyed said fifteen mining claims to the said Berner's Bay Mining and Milling Company, and that your petitioner would not have purchased any of said forty-six bonds or induced any of his friends to purchase any of said bonds had he not relied upon said defendant's, Thomas S. Nowell, promise to him to convey or cause to be conveyed said [29] fifteen mining claims to said Berner's Bay Mining and Milling Company as aforesaid.

XI.

That thereafter the said Berner's Bay Mining and Milling Company paid to said defendants Thomas S. Nowell and Willis E. Nowell the full consideration and purchase price for said fifteen mining claims, as hereinbefore alleged, and said company caused to be issued to the said Thomas S. Nowell 5,000 shares of the capital stock of the said corporation of the par value of \$100.00 per share, and to the said defendant, Willis E. Nowell, 10,000 shares of the capital stock of said corporation of the par value of \$100.00 per share; that your petitioner believes and avers the fact to be that the true intent and meaning of the proceedings at the said meeting of stockholders of June 24, 1896, was to sell to the said Berner's Bay Mining and Milling Company, in connection with said other twelve claims, said Northern Light No. 1, Northern Light and Northern Light No. 2, constituting the Johnson Group; and your peti-

tioner further alleges that the said three claims then constituted and do now constitute the principal value of the fifteen claims so offered for sale pursuant to the said notice of said meeting, and so offered to your petitioner as an inducement to cause your petitioner and his friends to purchase said forty-one bonds and two hundred and ninety-two shares.

XII.

That your petitioner is informed and believes, and upon such information and belief avers the truth to be, that after date of said stockholders' meeting and after said sale of said fifteen mining claims, as aforesaid, by the insertion in an offer of sale recorded in the minutes of the stockholders' meeting of the words "last twelve" the true intent and meaning of said transaction was wrongfully and fraudulently altered; that during the time of the acts herein complained of the books of said corporation, [30] including the record books and record papers and proceedings of said corporation, were in the custody and control of the said defendant Thomas S. Nowell and the assistant treasurer and assistant clerk of said corporation, the said Arthur L. Nowell, deceased, at the general office of said corporation, situated at Boston, Massachusetts, where the eastern business and financial transactions of said corporation were conducted; that thereafter and in pursuance of a scheme and conspiracy on the part of the said defendants Thomas S. Nowell and Willis E. Nowell to defraud the said Berner's Bay Mining and Milling Company and its creditors, the said Thomas S. Nowell and Willis E. Nowell failed, neglected and

refused to convey to the said corporation the Berner's Bay Mining and Milling Company the said three claims known as the Johnson Group, to wit: Northern Light or Johnson, Northern Light Extension No. 1 or Emma and Northern Light Extension No. 2; that your petitioner believed that said Johnson Group of mines had been conveyed to the Berner's Bay Mining and Milling Company at said meeting of stockholders on the 24th day of June, 1896, and did not learn until long afterwards that said Johnson Group of mines had not been conveyed by said Thomas S. Nowell to the said corporation, The Berner's Bay Mining and Milling Company.

XIII.

That since the 24th day of June, 1896, said defendants, Thomas S. Nowell and Willis E. Nowell and the Nowell Mining and Milling Company, have held the legal title in and to said three lode mining claims above described for the use and benefit of the said Berner's Bay Mining and Milling Company, its stockholders and creditors.

XIV.

That some time prior to the twenty-fifth day of May, 1900, the said defendants, Thomas S. Nowell and Willis E. Nowell, in [31] pursuance of said conspiracy to defraud the said Berner's Bay Mining and Milling Company out of said three mining claims known as the Johnson Group, as hereinbefore described, organized or caused to be organized under the laws of the State of Maine, a corporation known as the Nowell Mining and Milling Company, one of the defendants herein; that said corporation was so

organized as aforesaid with a capital stock of One Million Dollars, consisting of ten thousand shares of the par value of One Hundred Dollars; that said Thomas S. Nowell was chosen its first president and thence hitherto has continued as such; that since the organization of said corporation your petitioner is informed and believes that the same has been controlled and managed by the said defendants, Thomas S. Nowell, who holds one share of stock, and Willis E. Nowell, who holds or controls 9,997 shares of the stock of said defendant corporation, the Nowell Mining and Milling Company.

XV.

That some time between the date of the organization of the said defendant Nowell Mining and Milling Company and prior to the tenth day of December, 1902, said defendant Thomas S. Nowell and Willis E. Nowell transferred and conveyed or pretended to transfer and convey to the said Nowell Mining and Milling Company the said Johnson Group of claims; but said transfer or conveyance was without consideration and with a full knowledge and notice on the part of the said Nowell Mining and Milling Company of all the acts, facts and transactions in connection with the sale of said properties to the Berner's Bay Mining and Milling Company, and with full notice and knowledge of the rights, equities and claims of the Berner's Bay Mining and Milling Company, its stockholders and creditors in and to said property; that your petitioner is further informed and believes, and therefore alleges, that in pursuance of said conspiracy and to carry [32]

out the same, and in order to defraud and deprive said corporation, the Berner's Bay Mining and Milling Company of said Johnson Group of mines, the defendants, Thomas S. Nowell and Willis E. Nowell, caused an application and necessary steps and proofs to be taken and made in the United States Land Department to secure United States Patent to said claims to be issued to said defendant, Nowell Mining and Milling Company; that said application and proofs and all of said proceedings so taken, as aforesaid, were carried on and conducted without the knowledge of or notice to your petitioner or to the Berner's Bay Mining and Milling Company, and that the same was entirely *ex parte* by the said Nowell Mining and Milling Company and the said defendants, Thomas S. Nowell and Willis E. Nowell; that on the 10th day of December, 1902, the United States of America issued to said defendant, Nowell Mining and Milling Company its letters patent, conveying to the said Nowell Mining and Milling Company each of the three claims constituting the Johnson Group of mines.

That said defendant Nowell Mining and Milling Company took said patent and acquired said mining claims with full knowledge and notice of the transactions hereinabove alleged in connection with the sale of said mining properties to the Berner's Bay Mining and Milling Company, and said defendant, Nowell Mining and Milling Company, now holds the naked legal title to the said claims in trust for the use and benefit of the said Berner's Bay Mining and Milling Company, its stockholders and creditors.

XVI.

That the defendant, Alaska Nowell Gold Mining Company, is a corporation, organized and existing under the laws of the District of Alaska; that said defendant asserts some claim or interest in said mining claims known as the Johnson Group, either as purchaser or successor in interest to the defendant Nowell Mining and Milling Company; but said claim or interest is without [33] right and is subordinate to and subject to the rights of said Berner's Bay Mining and Milling Company.

WHEREFORE, your petitioner prays that this Court decree:

1. That those certain mining claims, as described in allegation No. 17 of the complaint herein, and known as the Johnson Group of mines, called and named the Northern Light or Johnson, Northern Light Extension No. 1, or Emma, and Northern Light Extension No. 2, were sold by the defendants, Thomas S. Nowell and Willis E. Nowell, to the Berner's Bay Mining and Milling Company, on the 24th day of June, 1896; and that said corporation paid to said defendants the full agreed consideration and price therefor.

2. That said three mining claims were transferred to the Nowell Mining and Milling Company, one of the defendants herein, by defendants, Thomas S. Nowell and Willis E. Nowell, with full knowledge and notice on the part of the said Nowell Mining and Milling Company of the rights of the Berner's Bay Mining and Milling Company in and to said property.

3. That defendant, Nowell Mining and Milling Company, a corporation, holds said three mining claims under a patent from the United States of America, dated December 10th, 1902, in trust for the use and benefit of the Berner's Bay Mining and Milling Company.

4. That defendant Nowell Mining and Milling Company do convey to said The Berner's Bay Mining and Milling Company the legal title to said three mining claims within such time as this court shall direct, or, failing to do so, that a Master, appointed by this Court, in that behalf, do make such conveyance, and that such conveyance, when made, be delivered to the plaintiffs herein as receivers of the property of the Berner's Bay Mining and Milling Company for the benefit of said corporation, its creditors and stockholders, and that the plaintiffs herein enter into possession and take into their custody and control said [34] Johnson Group of mining claims, to be held by them as such receivers in Cause No. 603, now pending in this court, for the benefit of the Berner's Bay Mining and Milling Company, its creditors and stockholders, subject to the order of this Court.

5. That if this Court should find that said defendant Nowell Mining and Milling Company has conveyed the legal title of said Johnson Group to the defendant Alaska Nowell Gold Mining Company, then that this Court declare, that said Alaska Nowell Gold Mining Company holds the title of said Johnson Group in trust for the use and benefit of the Berner's Bay Mining and Milling Company, its cred-

itors and stockholders, and that said Alaska Nowell Gold Mining Company transfer the legal title of said group of mining claims to the plaintiffs herein as receivers of the property and rights of the Berner's Bay Mining and Milling Company, and failing to do so, that a Master, appointed by this Court, in that behalf, do make such conveyance, and that such conveyance, when made, be delivered to the plaintiffs herein as receivers of the property and rights of the said Berner's Bay Mining and Milling Company.

6. And for such other and further relief as the nature of the case and the principles of equity require, and for costs of this action.

JOHN J. BOYCE, and

SHACKLEFORD & LYONS,

Attorneys for Petitioner.

United States of America,
District of Alaska,—ss.

I, T. R. Lyons, being first duly sworn, on oath, say: That I am one of the attorneys for Henry Endicott, intervener in the above-entitled action; that I have read the foregoing petition and know the contents thereof, and believe the same to be true. The reason I make this verification is because said Henry Endicott is not now within the District [35] of Alaska.

T. R. LYONS.

Subscribed and sworn to before me this 31st day of March, A. D. 1906.

[Court Seal]

D. C. ABRAMS,

Deputy Clerk District Court, for Division No. 1,
Alaska.

IV.

That thereafter these plaintiffs duly appeared in said suit and filed their answer to said bill, which said answer is in words and figures as follows, to wit:

No. 519-A.

“F. D. NOWELL and W. B. HOGGATT, Receivers
of the Property of the BERNER’S BAY
MINING AND MILLING COMPANY, a
Corporation,

Plaintiffs,

vs.

THOMAS S. NOWELL, WILLIS E. NOWELL,
THE NOWELL MINING AND MILLING
COMPANY, a Corporation, and the ALASKA
NOWELL GOLD MINING COMPANY, a
Corporation,

Defendants.

**Answer of Defendants to Complaint [in D. C. No.
519-A].**

Now come the above-named defendants, by their attorneys, and for answer to the complaint of the plaintiff herein allege as and deny as follows:

I.

Defendants deny all and singular the allegation contained in the XI, XII, XIII, XIV, XV, XVI, XVII, and XVIII paragraphs of said complaint, except as herein expressly admitted and stated.

And for an affirmative defense to said action, defendants allege:

I.

That the three lode mining claims mentioned and described in the complaint as the Johnson or North-

ern Light, the Northern Light Extension No. 1, or Emma, and the Northern Light Extension No. 2, hereinafter called the 'Johnson Group,' were contracted to be purchased by the defendant Willis E. Nowell, from the original locators thereof, viz., Richard Johnson and David R. Price [36] on or about the 4th day of November, 1895, for the sum of \$25,000 cash. That said Willis E. Nowell thereafter, in the year 1898, completed the payment of said \$25,000 and therefrom obtained a conveyance of said claims. That the said Willis E. Nowell, from and after the year 1898, held, owned and possessed said claims, and expended large sums of money in opening, prospecting and developing the same until on or about November 10th, 1899, when for a valuable consideration to him in hand paid, he sold and conveyed said claims to the defendant, the Nowell Mining and Milling Company, a corporation; that said Nowell Mining and Milling Company, from and after said conveyance, owned, held and possessed said claims, performing the annual assessment work thereon and expending in that behalf large sums of money, until the year 1902, when it made application to the U. S. Government for patent to said claims, and duly proved its title and ownership, the requisite amount of improvements thereon, and thereupon made entry, paid the Government the purchase money required by law and received a patent thereto.

That afterwards, for a valuable consideration, the said Nowell Mining and Milling Company sold and conveyed the said claims to the defendant, The Alaska Nowell Gold Mining Company, which is now the legal

and equitable owner thereof in fee simple.

II.

That at all the times hereinbefore mentioned the Berner's Bay Mining and Milling Company and all its officers and stockholders were fully informed and had full notice of the ownership of said Johnson Group and of all the steps taken and expenditures made, by the holders and owners thereof; and neither the said Berner's Bay Mining and Milling Company nor any officer, agent or stockholder thereof has ever at any time suggested or claimed that said Berner's Bay Mining and Milling Company had acquired or claimed the title to said Johnson Group, or any interest therein. [37] That such knowledge and recognition has been constant for a period of over nine years, and during said time said Johnson Group has been acquired by the defendant, the Alaska Nowell Gold Mining Company, from the patentee of said Johnson Group without any knowledge or notice of any adverse claim thereto, and many innocent persons not parties to this suit have acquired the stock of said last-named defendant, in full reliance upon its ownership of said Johnson Group, which alone gave value to said stock.

Wherefore defendants pray that the pretended claim of the plaintiffs as receivers of the Berner's Bay Mining and Milling Company be adjudged stale and without any equity whatever, and that plaintiffs are estopped from asserting the same; and that defendants recover of and from the plaintiffs their costs herein.

MALONEY & COBB,
Attorneys for the Defendants.

United States of America,
District of Alaska,—ss.

Thomas S. Nowell, being first duly sworn, on oath deposes and says: I am one of the above-named defendants; I have heard read the above and foregoing answer, know the contents thereof and the same is true as I verily believe.

THOMAS S. NOWELL.

Subscribed and sworn to before me this 20th day of January, 1906.

[Notarial Seal]

J. H. COBB,
Notary Public in and for Alaska.”

V.

That thereafter these plaintiffs duly filed their answer to said bill of intervention, which said answer is in words and figures as follows, to wit: [38]

No. 519-A.

“F. D. NOWELL and W. B. HOGGATT, Receivers
of the Property of the BERNER’S BAY
MINING AND MILLING COMPANY, a
Corporation,

Plaintiffs,

vs.

THOMAS S. NOWELL, WILLIS E. NOWELL,
THE NOWELL MINING AND MILLING
COMPANY, a Corporation, and the ALASKA
NOWELL GOLD MINING COMPANY, a
Corporation,

Defendants.

**Answer of Defendants to Petition of Intervention of
Henry Endicott [in D. C. No. 519-A].**

Now comes the above-named defendants, and for answer to the petition of intervention of Henry Endicott denies and alleges as follows:

I.

They deny that the defendants, during the period of the organization of the Berner's Bay Mining and Milling Company, and prior to the month of June, 1896, acquired the properties in controversy in this suit by purchase or otherwise.

II.

Referring to paragraph ten (10) of said petition, these defendants admit that Thomas S. Nowell presented a proposition to the said Henry Endicott, substantially as alleged, but he denies that the same was ever accepted as offered; and they further deny that either the defendant Willis E. Nowell or Thomas S. Nowell were at that time owners of the Johnson Group, or had power to sell and convey the same, and he further alleges that said proposition was merely in the nature of a negotiation of and concerning a proposition thereafter to be submitted to the Berner's Bay Mining and Milling Company; defendant further denies that the intervenor persuaded William Endicott, Aaron Hobart, George Thatcher, Charles H. Sawyer, and Wallace Hackett to purchase thirty-three (33) or any number of the bonds mentioned, and he denies all and singular the further and remaining allegations in said paragraph contained. [39]

III.

Referring to the 11th paragraph of said petition, defendants deny that the consideration for the stock therein mentioned was the said fifteen (15) mining claims therein referred to, but state the truth and fact to be the consideration for said stock was twelve (12) certain mining claims which did not include the property in controversy in this suit, and which said twelve (12) claims were offered to and accepted by the Berner's Bay Mining and Milling Company in consideration of said stock on the 24th day of June, 1896.

IV.

Referring to the 12th, 13th, 14th, 15th and 16th paragraphs of said petition, defendants deny all and singular the allegations therein contained, except that they admit that the Alaska Nowell Gold Mining Company is asserting and claiming to be the owner in fee simple of the said Johnson Group of claims. And for a further and affirmative defense to said intervention defendants allege as follows:

That the defendant Willis E. Nowell, on or about the 4th day of November, 1895, entered into a contract to purchase the property in controversy herein from Richard Johnson and David R. Price, the original locators thereof. That said property was at said time unpatented, undeveloped mining claims. That the contract price agreed to be paid for the same was \$25,000.00. That thereafter, in the year 1898, the said Willis E. Nowell completed the payment for said property, and received from the said vendors a conveyance of the same, and thereafter held, owned

and possessed said claims and expended large sums of moneys in opening, prospecting and developing the same until on or about November 10th, 1899, on or about which date, for a valuable consideration to him in hand paid, he sold and conveyed said claims to the defendant, the Nowell Mining and Milling Company, a corporation. That thereafter the said Nowell Mining and Milling Company owned, held and possessed said claim, performing the [40] annual assessment work thereon, and expending large sums of money in that behalf until the year 1902, when it made application to the United States Government, and thereafter such proceedings were had that a patent was duly issued to it therefor. That afterwards, for a valuable consideration, the said Nowell Mining and Milling Company sold and conveyed the said claims to the defendant, the Alaska Nowell Gold Mining Company, which is now the legal and equitable owner thereof in fee simple. That at all the times heretofore mentioned, the said intervenor was fully informed and had full knowledge of the ownership of the said Johnson Group and of all the steps taken and the expenditures made by the owners and holders thereof, and at all times acquiesced in such claim and ownership, and has never at any time suggested or claimed that said Berner's Bay Mining and Milling Company had acquired or claimed any title, right or interest in said property.

That such knowledge and recognition has been constant for a period of over nine (9) years and during said period of time said Johnson Group has been purchased by the defendant, the Nowell Mining and

Milling Company from the United States Government, and has received a patent therefor, and no adverse claim was ever filed in said patent application on the behalf of the Berner's Bay Mining and Milling Company, or any other person; that the claim of the intervenor and of the plaintiffs herein is stale. That after the acquisition of the Government title as aforesaid, the defendant, the Alaska Nowell Gold Mining Company, purchased said property from the Nowell Mining and Milling Company, the patentee, without any knowledge or notice of any adverse claim thereto, and many innocent persons not parties to this suit have acquired the stock of said last-named defendant in full reliance of said ownership to the said property, which alone gave value to said stock.

Wherefore defendants pray that the bill of the intervenor [41] be dismissed, with costs and for such other and further relief as they may show themselves entitled.

MALONY & COBB,
Attorneys for Defendants.

United States of America,
District of Alaska,—ss.

Thomas S. Nowell, being first duly sworn, deposes and says: I am one of the defendants in the above-named answer. I have read the above and foregoing answer and know the contents thereof, and the same is true as I verily believe.

THOMAS S. NOWELL.

Subscribed and sworn to before me this 26th day of April, A. D. 1906.

[Seal]

J. H. COBB,
Notary Public in and for Alaska."

VI.

That thereafter the said plaintiffs in said suit filed their reply to the said answer to the bill of complaint, which said reply is in words and figures as follows, to wit:

No. 519-A.

"F. D. NOWELL and W. B. HOGGATT, Receivers
of the Property of the BERNER'S BAY
MINING AND MILLING COMPANY a
Corporation,

Plaintiffs,

vs.

THOMAS S. NOWELL, WILLIS E. NOWELL,
the NOWELL MINING AND MILLING
COMPANY, a Corporation, and the ALASKA
NOWELL GOLD MINING COMPANY, a
Corporation,

Defendants.

**Reply of Plaintiffs to Defendants' Answer [in D. C.
No. 519-A].**

Come now the plaintiffs above-named and replying to the answer of the defendants on file herein admit, deny and allege as follows:

I.

Referring to the allegation in paragraph I of the affirmative defense contained, admit that Willis E. Nowell, one of the defendants, purchased the Johnson or Northern Light, the Northern [42] Light

Extension No. 1, or the Emma, and the Northern Light Extension No. 2; and thereafter that he sold and conveyed or pretended to sell and convey the said claims to the defendant, the Nowell Mining and Milling Company, and admit that thereafter an application was made to the United States Government for patent to the said claims, and that a patent therefor was issued to the said defendant, Nowell Mining and Milling Company. And these plaintiffs further aver that said defendant, Nowell Mining and Milling Company, failed to comply with the provisions of chapter 23, sections 225 to 231, inclusive, of the Civil Code of Alaska, and that said defendants, Nowell Mining and Milling Company, never filed in the office of the Secretary of the District of Alaska, or in the office of the Clerk of the District Court for Division No. 1 thereof, a duly authenticated or any copy of its Charter or Articles of Incorporation, and never filed in said offices, or either of them, the statement, certificate or consent or either of them, required by said chapter 23 of said Civil Code as aforesaid; and said defendant, Nowell Mining and Milling Company, had no capacity as a foreign corporation doing business in the District of Alaska to receive a patent for said lands and for the reasons last aforesaid these plaintiffs further aver that said defendant, Nowell Mining and Milling Company, had no capacity to convey, transfer or assign to the defendant, Alaska Nowell Gold Mining Company, said lode mining claims, being the real property described in the complaint and referred to in the answer herein; and the attempted conveyance from said defendant, Nowell Mining and Milling Company, to said defend-

ant, the Alaska Nowell Gold Mining Company, was and is void.

And as to the other allegations in the said paragraph contained, these plaintiffs have not sufficient information upon which to found a belief, and therefore deny each and every other allegation in the said paragraph contained. [43]

II.

Referring to paragraph II of the said affirmative defense, deny that the Berner's Bay Mining and Milling Company, or any of its officers and stockholders other than the defendants, Thomas S. Nowell and Willis E. Nowell and the said Arthur L. Nowell, mentioned in the plaintiff's complaint, were informed or had full notice, or were informed or had notice at all of the matters and things in the said paragraph set out; and deny each and every other allegation in the said paragraph contained.

WHEREFORE, the plaintiffs pray for judgment, decree and relief as heretofore prayed for in their complaint.

SHACKLEFORD & LYONS,

J. J. BOYCE,

Attorneys for Plaintiffs.

United States of America,
District of Alaska,—ss.

W. B. Hoggatt, being duly sworn, deposes and says: That he is one of the plaintiffs in the above-entitled action; that he has read the foregoing reply and knows the contents thereof, and that the same is true as he verily believes.

W. B. HOGGATT.

Subscribed and sworn to before me this 21st day of February, 1906.

C. C. PAGE,
Clerk District Court for Division No. 1, Alaska.

Verified as per order of court Feby. 21st, 1906.

C. C. PAGE,
Clerk."

VII.

That thereafter the said Henry Endicott filed his reply to the answer to the bill of intervention, which reply is in words and figures as follows, to wit: [44]

No. 519-A.

"F. D. NOWELL and W. B. HOGGATT, Receivers,
of the Property of the BERNER'S BAY
MINING AND MILLING COMPANY, a
Corporation,

Plaintiffs,

vs.

THOMAS S. NOWELL, WILLIS E. NOWELL,
THE NOWELL MINING AND MILLING
COMPANY, a Corporation and THE
ALASKA NOWELL GOLD MINING COM-
PANY, a Corporation,

Defendants.

**Reply of Henry Endicott to Defendants' Answer [in
D. C. No. 519-A].**

Comes now Henry Endicott, and for reply to the answer of the defendants herein to his petition of intervention admits, denies and alleges as follows:

Referring to paragraph I of the further and affirmative defense to said intervention in said answer contained, and referring particularly to that portion

of said paragraph, reading as follows:

That the defendant Willis E. Nowell, on or about the 4th day of November, 1895, entered into a contract to purchase the property in controversy herein from Richard Johnson and David R. Price, the original locators thereof. That said property was at said time unpatented, undeveloped mining claims. That the contract price agreed to be paid for the same was \$25,000. That thereafter, in the year 1898, the said Willis E. Nowell completed the payment for said property, and received from the said vendors a conveyance of the same, and thereafter held, owned and possessed said claims and expended large sums of moneys in opening, prospecting and developing the same until on or about November 10, 1899.

This intervenor has not sufficient information upon which to form a belief as to the truth or verity of the allegations therein contained, and therefore denies each and every one thereof.

This intervenor admits that on or about November 10, 1899, Willis E. Nowell conveyed or pretended to convey the said mining claims to the defendant Nowell Mining and Milling Company, a corporation.

[45]

This intervenor admits that thereafter said Nowell Mining and Milling Company held and possessed said claims; and this intervenor admits that in the year 1902 the Nowell Mining and Milling Company made application to the United States Government, and that a patent was issued to it for said mining claims; and this intervenor admits that afterwards the Nowell Mining and Milling Company conveyed or pretended to convey said claim to the defendant

Alaska Nowell Gold Mining Company, and this intervenor admits that the Nowell Mining and Milling Company has received a patent for said claims from the United States, and that no adverse claim was filed in said patent application in behalf of the Berner's Bay Mining and Milling Company, or any other person, and denies each and every allegation in said affirmative defense contained.

WHEREFORE the intervenor prays that the prayer of his petition be granted.

J. J. BOYCE,

SHACKLEFORD & LYONS,

Attorneys for Intervenor.

United States of America,

District of Alaska,—ss.

I, Lewis P. Shackelford, being first duly sworn, on oath say: That I am one of the intervenor's attorneys in the above-entitled action; that I have read the foregoing reply and know the contents thereof, and believe the same to be true; that intervenor is not a resident of or within the District, and I make this verification in his behalf for that reason.

LEWIS P. SHACKLEFORD.

Subscribed and sworn to before me this 27th day of April, A. D. 1906.

T. R. LYONS,

Notary Public for Alaska." [46]

VIII.

That thereafter and before judgment and decree in said cause, the defendant J. C. McBride was duly appointed and qualified as receiver in the place and stead of the said W. B. Hoggatt and F. D. Nowell

and was substituted as plaintiff in said suit.

IX.

That thereafter such further proceedings were had in said suit that on the 9th day of January, 1907, the Court made and entered findings of fact and conclusions of law in said cause and its final decree therein, which said findings, conclusions and decree are in words and figures as follows, to wit:

Findings of Fact [in D. C. No. 519-A].

I.

The Court finds that the facts alleged in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, inclusive, in the plaintiffs' complaint, the same having been admitted in the pleadings, are true, and the Court further finds that the facts alleged in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, inclusive, of the intervening complaint of Henry Endicott the same having been admitted in the pleadings, are true.

II.

That the plaintiffs F. D. Nowell and W. B. Hoggatt were at and prior to the commencement of this suit the duly appointed receivers of the Berner's Bay Mining and Milling Company, the corporation hereinafter mentioned, the said F. D. Nowell having been appointed receiver of the said Berner's Bay Mining and Milling Company on the 12th day of February, 1898, and having acted as the sole receiver of the said Berner's Bay Mining and Milling Company up to the appointment of W. B. Hoggatt, one of the plaintiffs herein, on the second day of January, 1906. That the said W. B. Hoggatt was on said day appointed coreceiver [47] with the said F. D. No-

well for the express purpose of instituting this action.

That the plaintiff, W. B. Hoggatt, was so appointed coreceiver at said time for the reason that said F. D. Nowell was the son of Thomas S. Nowell, one of the defendants herein, and a stockholder in the Alaska Nowell Gold Mining Company.

III.

That on the second day of October, 1906, such proceedings were had in this court in the cause in which F. D. Nowell and said W. B. Hoggatt had been appointed receivers, being cause No. 603, in this court, that F. D. Nowell was removed as said receiver by an order of this court duly made and entered, and the said W. B. Hoggatt resigned his position as receiver in said cause, and that John C. McBride, one of the plaintiffs above named, was appointed sole receiver of the Berner's Bay Mining and Milling Company to succeed the said F. D. Nowell and the said W. B. Hoggatt, and has been ever since and now is the duly appointed, acting and qualified receiver of the Berner's Bay Mining and Milling Company, and that such proceedings were thereafter had in this cause that the said John C. McBride was duly substituted as plaintiff herein in the name, place and stead of the said F. D. Nowell, and the said W. B. Hoggatt, as receivers aforesaid.

IV.

That the intervenor and plaintiff herein, Henry Endicott, of Boston, Massachusetts, was on and prior to the month of June, 1896, and during the balance of said year a director in the Berner's Bay Mining

and Milling Company, and a stockholder therein, and that such proceedings were had in this cause that on the 26th day of April, 1906, the said Henry Endicott was permitted to intervene as plaintiff in this cause.

That in the year 1892 the Berner's Bay Mining and Milling [48] Company was duly organized as a corporation under the laws of the State of Maine, and that at all times since that time in these findings mentioned the defendant, Thomas S. Nowell, was the president of said corporation and a director therein, and the principal stockholder therein, and that during and for some time prior and subsequent to the month of June, 1896, he held a general power of attorney from Willis E. Nowell, one of the defendants herein, authorizing him to transact any and all business for and on behalf of the said Willis E. Nowell, including the transactions herein referred to, and that at all times in these findings mentioned, he acted as the duly authorized attorney in fact and agent of the said Willis E. Nowell. That the said Thomas S. Nowell is and has been since the organization thereof the president and a director and stockholder in the Nowell Mining and Milling Company, one of the defendants herein, and also the president and a stockholder in the Alaska Nowell Gold Mining Company, one of the defendants herein. That the defendant, Willis E. Nowell, was ever since the organization of the said Berner's Bay Mining and Milling Company, and at all times in these findings mentioned, one of the principal stockholders therein, and that the said defendant Willis E. Nowell was and has been since

the organization of the said Nowell Mining and Milling Company one of the defendants herein, the secretary and a director thereof, and the principal stockholder therein, and was and has been at all times since the organization thereof the secretary and a director, and the principal stockholder in the Alaska Nowell Gold Mining Company, one of the defendants herein.

VI.

That during the month of June, 1896, the said Thomas S. Nowell was the owner and holder of 4496 shares of the capital stock of the Berner's Bay Mining and Milling Company, and that the said Willis E. Nowell was the owner and holder of 457 shares [49] of the capital stock of the Berner's Bay Mining and Milling Company, and that one Arthur L. Nowell, hereinafter mentioned, a son of the said Thomas S. Nowell, and a brother of the said Willis E. Nowell, was the owner and holder of 96 shares of the capital stock of the said Berner's Bay Mining and Milling Company. That the total capital stock of the Berner's Bay Mining and Milling Company on and during the month of June, 1896, was 10,000 shares, and that the said Thomas S. Nowell, Willis E. Nowell and Arthur L. Nowell owned and held during the month of June, 1896, a control of the capital stock of the said Berner's Bay Mining and Milling Company and acted together through one Wm. M. Payson and Arthur L. Nowell in the transactions of the meeting of June 24th, 1896, herein in these findings referred to.

VII.

That since the organization of the Nowell Mining and Milling Company, and during all times herein referred to, the said Willis E. Nowell owned, held and controlled 9,997 shares of the capital stock of the Nowell Mining and Milling Company, one of the defendant corporations, and the said Thomas S. Nowell owned, held and controlled one share of the capital stock of the said Nowell Mining and Milling Company. That the total capital stock of the said Nowell Mining and Milling Company consisted of ten thousand shares of the par value of one hundred dollars each.

That the defendant, Alaska Nowell Gold Mining Company, a corporation, had a capital stock of fifty-five thousand shares of the par value of one hundred dollars each, and that the defendant, Willis E. Nowell, was the owner and holder of 49,996 shares of the capital stock of the said Alaska Nowell Gold Mining Company.

VIII.

That on the 4th day of November, 1895, said Willis E. Nowell became the owner of those certain lode mining claims in controversy in this action known as the Northern Light, or Johnson, The Northern Light Extension No. 1 or Emma, and the Northern Light [50] Extension No. 2, and was on the 24th day of June, 1896, at the time of the corporate meeting hereinafter referred to, the owner thereof. That thereafter and on the 10th day of October, 1899, and subsequent to the proceedings in that meeting of June 24th, 1896, hereinafter referred to, the said

Willis E. Nowell conveyed to the said defendant, Nowell Mining and Milling Company all of his right, title and interest in and to those certain lode mining claims in controversy herein, being the Northern Light, or Johnson, Northern Light Extension No. 1, or Emma, and the Northern Light Extension No. 2, but that the said conveyance to the said Nowell Mining and Milling Company was made with full notice and knowledge on the part of the Nowell Mining and Milling Company, of the title, rights and equities in and to the said claims of the Berner's Bay Mining and Milling Company, and that thereafter and in the year 1902, the said Nowell Mining and Milling Company applied in the United States Land Office at Juneau, Alaska, for a patent to the said Northern Light or Johnson, Northern Light Extension No. 1, or Emma, and the Northern Light Extension No. 2, lode mining claims, and such proceedings were therein had that thereafter and prior to the 10th day of November, 1903, a United States patent was issued for the said lode mining claims by the United States of America to the said Nowell Mining and Milling Company.

That said proceedings in the United States Land Office were had *ex parte* and without notice to the Berner's Bay Mining and Milling Company or the receivers thereof, or to the intervenor plaintiff, Henry Endicott, and the title acquired through said patent by the Nowell Mining and Milling Company was acquired with a full knowledge on the part of the said Nowell Mining and Milling Company of the title, rights and equities of the Berner's Bay Min-

ing and Milling Company in and to the said Northern Light, or Johnson, Northern Light Extension No. 1, or Emma, and Northern [51] Light Extension No. 2, lode mining claims.

IX.

That thereafter and on the 10th day of November, 1903, the said Nowell Mining and Milling Company conveyed to the said Alaska Nowell Gold Mining Company, one of the defendants herein, all of its right, title and interest, in and to the said Northern Light or Johnson, Northern Light Extension No. 1, or Emma, and Northern Light Extension No. 2, lode mining claims, in controversy herein, but that the said conveyance was made to the said Alaska Nowell Gold Mining Company without consideration and with full knowledge on the part of the said Alaska Nowell Gold Mining Company of the title, rights and equities of the Berner's Bay Mining and Milling Company, therein.

X.

That the Berner's Bay Mining and Milling Company, of which the said F. D. Nowell and the said W. B. Hoggatt were, and the said J. C. McBride now is, receiver, was organized in the year 1892 under the laws of the State of Maine, and was and is a corporation and had a capital stock upon its organization of one million dollars, and the said Thomas S. Nowell was elected its first president, and that from its organization control of the majority of the stock in said corporation issued has been in the said Thomas S. Nowell and his sons, Willis E. Nowell and Arthur L. Nowell.

That on November 15th, 1892, the said Berner's Bay Mining and Milling Company had duly mortgaged by deed of trust to the International Trust Company, of Boston, Mass., a corporation, as trustee, the properties then owned and held by the said Berner's Bay Mining and Milling Company, which said mortgage was given to secure an issue of bonds of two hundred thousand dollars, and said mortgage was a lien upon all of the property of the said Berner's Bay Mining and Milling Company. That the property of the said [52] Berner's Bay Mining and Milling Company consisted of lode mining claims, millsites, water rights, etc., near Berner's Bay, in the Juneau Recording District of Alaska.

That the first installment of bonds issued under the said trust deed of November 15, 1892, matured on and prior to the month of June, 1896, and that the said corporation defaulted in the payment of the same and was still in default on the third day of June, 1896, and up until the 24th day of June, 1896.

XI.

That the said three lode claims in controversy herein known as the Johnson Group are particularly bounded and described as follows:

Northern Light: Beginning at corner No. 1, from which U. S. Mineral Monument No. 1 bears south 25 degrees 3 minutes west, 3,983 feet distant, the mouth of a joint tunnel bears north 39 degrees 6 minutes west, 1,789.3 feet distant; thence north 41 degrees 15 minutes east 460 feet to witness corner No. 2; 600 feet to corner No. 2; thence north 48 degrees 45 minutes west, 1,450 feet to witness corner to corner No. 3, 1500

feet to corner No. 3; thence south 41 degrees 15 minutes west 300 feet to discovery point; 600 feet to corner No. 4; thence south 48 degrees 45 minutes east 1500 feet to corner No. 1, the place of beginning.

Northern Light Extension No. 1, or Emma: Beginning at corner No. 1, from which U. S. Mineral Monument bears south 45 degrees 59 minutes west, 3,832 feet distant; thence north 41 degrees 15 minutes east 600 feet to corner No. 2; thence north 48 degrees 45 minutes west, 1105 feet to witness corner to corner No. 3, 1298 feet to corner No. 3, identical with corner No. 2 of Northern Light; thence south 41 degrees 15 minutes west 600 feet to corner No. 4, identical with corner No. 1, of said Northern Light; thence south 48 degrees 45 minutes east 1297 feet to corner No. 1, the place of beginning.

Northern Light Extension No. 2: Beginning at corner No. 1 [53] identical with corner No. 4 of Northern Light from which U. S. Mineral Monument No. 1 bears south 6 degrees 56 minutes west, 4,638.4 feet distant, and the mouth of a tunnel bears north 6 minutes west 399.6 feet distant; thence north 48 degrees 45 minutes west, 807 feet to witness corner to corner No. 2, 1500 feet to corner Number 2, thence north 41 degrees 15 minutes east 600 feet to corner No. 3; thence south 48 degrees 45 minutes east, 357.6 feet to witness corner to corner No. 3, 1125.6 feet to witness corner to corner No. 4; 1500 feet to corner No. 4; thence south 41 degrees 15 minutes west 600 feet to corner No. 1, the place of beginning; said Lot No. 380 containing 59.19 acres, more or less.

XII.

That in the month of June, 1896, the said defendant, Thomas S. Nowell, on behalf of himself and the said defendant, Willis E. Nowell, represented to the stockholders, creditors and persons interested in the success of said corporation, Berner's Bay Mining and Milling Company, the advantages to that corporation of the acquisition and purchase of those certain adjoining and adjacent properties then owned by them the said defendants Thomas S. Nowell and Willis E. Nowell, situated some adjoining and some in the immediate vicinity of the properties of said corporation the Berner's Bay Mining and Milling Company, which were then being worked and developed by said corporation last aforesaid at Berner's Bay, Alaska, as hereinbefore in these findings aforesaid. That the said defendant, Thomas S. Nowell, as aforesaid, represented to Henry Endicott, the intervenor herein and a stockholder of said Berner's Bay Mining and Milling Company, and to certain other stockholders of said corporation residing in Boston and vicinity, who were without any personal knowlege of the physical situation and condition of said property and the advantages to accrue to said corporation, the Berner's Bay Mining and Milling Company, by the acquisition of those certain fifteen mining claims and properties [54] then owned by them, the said Thomas S. Nowell and Willis E. Nowell as aforesaid, and particularly those three certain claims known as and herein in these findings referred to, as the Johnson Group, which were then known to be of great value and of those certain other twelve claims herein

in these findings particularly referred to and described, which were located immediately in connection with the said Johnson Group and the Berner's Bay properties then owned by said corporation, the Berner's Bay Mining and Milling Company; and also the advantages of increasing the capital stock of said corporation, the Berner's Bay Mining and Milling Company, for the purpose of purchasing said additional mining claims and properties and the necessity for incurring additional indebtedness for the prosecution, development and advantage of said enterprise then being prosecuted and conducted as in these findings found and set forth. That the said defendant, Thomas S. Nowell, on behalf of himself and his said son, the defendant, Willis E. Nowell, then and there represented to said Henry Endicott and said stockholders as aforesaid that they then owned and would sell and convey to said corporation the Berner's Bay Mining and Milling Company, said fifteen mining claims including the Johnson Group then owned by them as aforesaid for and in consideration of the issuing to them of the sum of One and One Half Million Dollars (\$1,500,000.00) of capital stock of said corporation, and proposed that an additional bonded indebtedness in the sum of Three Hundred Thousand Dollars (\$300,000.00) be incurred by said corporation, Berner's Bay Mining and Milling Company, that the proceeds arising therefrom might be used as a working capital to develop the said mining properties as in these findings described and found. That thereupon the said defendant, Thomas S. Nowell, acting on behalf of himself and the said defendant,

Willis E. Nowell, as aforesaid, embodied said representations and propositions in a written offer addressed to the said intervenor, Henry Endicott, which was in words and figures following to wit: [55]

“ ‘Thomas S. Nowell,
5 Tremont Street,
Boston, Mass.

June 3, 1896.

Henry Endicott, Esq.,
Boston, Mass.

My dear Mr. Everett: After my conversation with you, I herewith submit the basis of a proposition that I have for a purchase of bonds from New York parties who desire not to be known as sellers of the bonds and who have a use for their money in another direction. The proposition is as follows:


46 Berner's Bay bonds of \$1,000.00 each and 292 shares of the capital stock of said company. The par value of the bonds and stocks is \$75,200.00, and accrued interest is \$1,878.33 to June 15th, making in all \$77,078.33. Now it will require to purchase this interest in cash not later than June 15th, \$47,948.33. We practically get the stock for nothing, 292 shares, with a par value of \$29,200.00, and as to the value of that stock it goes without my repeating as to my appreciation of its value which is today as high as it ever was.

Now, in order to carry out my plan, which I believe I can do, providing I get control of these bonds and stock, getting rid of the element that have taken the stand that they are not willing to extend these bonds, I can see my way clear to raise of this amount

\$20,000.00, so that there will be \$27,948.33 more to raise and the stock to be distributed pro rata between my friends that take the \$20,000.00 and those that take the balance. I regard it as of vital importance that this be accomplished, and I am satisfied that it can be. I will herewith submit my plan that I have talked over with you today which is as follows, viz:

To increase the capital stock of the company to two and one half million dollars; to increase the bonded indebtedness of the company to \$500,000.00. It is now \$200,000.00; to set aside [56] \$500,000.00 of this stock to be used as far as may be found necessary for the purpose of retiring the present \$200,000.00 bonds for the purpose of selling the \$300,000.00 at par and the balance of the increased capital to be paid over to me or anyone that I may direct, for the turning over to the company what are known as the Johnson mines which are known to be of great value and beyond that twelve other claims which are all right in connection and should be worked with the Berner's Bay present properties. I consider these properties that I should turn over to the company of certainly as great a value if not more than the present holdings of the company; in fact I believe that the Johnson properties have more real value in the deposit than all of the present holdings of the Berner's Bay Co., and then aside from that I claim that the surface indications are very much richer than the Comet was at the same stage of development.

I am willing to accept this stock on the basis that as a consideration for the payment of all these properties, that it shall not participate in the dividends of



the Company until the original stock has realized 100% in dividends, that is the full capitalization of which one million dollars shall be paid in dividends before the increased stock that I receive in payment for these properties participate in dividends. All other rights and privileges of the stock I would enjoy excepting the right of receiving dividends on it until the old stock has received the 100% as hereinafter specified.

To recapitulate.

Increase the capital stock of the Berner's Bay Mining and Milling Company from \$1,000,000.00 to \$2,500,000.00. Set aside \$500,000.00 of the increased capital stock to be used as far as necessary in retiring the \$200,000.00 bonds and floating the balance of the \$500,000.00 as a new purchase for fresh money. Should any of this \$500,000.00 stock be saved the same to be for the benefit of the Treasurer. Purchase of T. S. Nowell the adjoining [57] claims which he has control of to be deeded to the company and \$1,000,000 of capital stock to be issued to him in payment, the said stock not to participate in stock dividends until the original stock has received 100%.
 46 bonds of the Berner's Bay M. & M. Co...46000.00
 7 months accrued interest to June 15th.....1878.33
 292 shares of capital stock, par value.....29200.00

77078.33

This can be had for the sum of \$47,948.33, provided payment is made on or before June 15th, 1896.

T. S. Nowell will agree to raise and take \$20,000.00 of the above sum of 20 bonds and accrued interest, \$20,816.00.'

That after the said third day of June, 1896, and prior to the 24th day of June, the said Henry Endicott duly accepted the said offer set forth and the said Henry Endicott for himself and associates and with the assent of the said Thomas S. Nowell, purchased forty-one of the forty-six bonds described in the said offer of June 3, 1896, and paid therefor the sum of \$42,736.58, and received and accepted therewith his *pro rata* of the said 292 shares of stock mentioned in the said proposition of June 3, 1896, and that said Henry Endicott acted upon the premises and representations in the said offer of June 3, 1896, and relying thereupon the payment of the said sum of \$42,736.58 was duly made and in reliance upon the representations of the said Thomas S. Nowell, made on behalf of himself and the said Willis E. Nowell that he would convey all the said fifteen mining claims including the Northern Light, or Johnson, Northern Light Extension No. 1, or Emma, and Northern Light Extension No. 2. That relying further upon said representations and promises the said Henry Endicott executed a proxy in favor of the said Thomas S. Nowell authorizing him to vote his stock in his name, place and stead at said meeting of Berner's Bay Mining and Milling Company to [58] be held on the 24th day of June, 1896, for the purpose of consummating the transactions projected and set forth in the said offer of June 3d, 1896; and the said Thomas S. Nowell accepted the said proxy for the purpose of voting the same at said meeting and caused the same to be represented thereat. That at the meeting of June 24th, 1896, hereinafter mentioned, the said Thomas

S. Nowell was duly represented by proxy and held in his own name a majority of the stock represented at said meeting.

XIII.

That in pursuance of said offer it was agreed that a special meeting of the stockholders of the Berner's Bay Mining and Milling Company should be called to acquire said properties upon the said terms proposed. That prior to the 24th day of June, 1896, the said defendant, Thomas S. Nowell, caused a Notice of a stockholders' meeting of Berner's Bay Mining and Milling Company to be given wherein and whereby it was proposed to see if the said corporation would purchase the following fifteen mining claims, to wit: Northern Light Extension No. 1, or Emma, Northern Light, or Johnson, Portsmouth, Seward Extension, Columbian East Extension, Bear Extension, Savage Extension, Lucky Boy, Columbian West Extension, Selkirk, Rustler, Alaska Maid, Acropolis, Northern Star, Northern Light No. 2; that in the said notice of stockholders' meeting last above referred to it was also proposed to increase the capital stock of the said Berner's Bay Mining and Milling Company from one million dollars (\$1,000,000.00) to two million five hundred thousand dollars (\$2,500,000.00), for the purpose of acquiring said properties, and in said notice it was also proposed to increase the bonded indebtedness of said corporation, Berner's Bay Mining and Milling Company, from two hundred thousand dollars (\$200,000.00) to five hundred thousand dollars (\$500,000.00). That the said notice of meeting last above referred to was signed by the said [59]

defendant, Thomas S. Nowell, president, and by the said intervenor, Henry Endicott, a stockholder and director of said corporation, Berner's Bay Mining and Milling Company, and was and is in words and figures as follows, to wit:

“ ‘Office Berner's Bay Mining and Milling Company.

Portland, Maine, June 12, 1896.

To the Stockholders of the Berner's Bay Mining and Milling Company:

A special meeting of the stockholders of said corporation is hereby called to be held at its office No. 30 Exchange St., Portland, Maine, on Wednesday, June 24, 1896, at twelve o'clock noon, for the following purposes, viz.:

I.

To hear and approve the records of the doings of the stockholders, directors and officers.

II.

To see if the stockholders will vote to increase the capital stock of the corporation to \$2,500,000.00 and make a portion of the increased stock a deferred stock and fix all the terms and conditions of the same and certificates thereof, and to determine the purposes for which said increased stock shall be issued and used.

III.

To see if the stockholders will vote to purchase certain mines, mining claims and properties in Alaska known as “Northern Light No. 1,” “Johnson,” “Portsmouth,” “Seward Extension,” “Columbian East Extension,” “Bear Extension,” “Savage Extension,” “Lucky Boy,” “Columbian West Extension,” “Selkirk,” “Rustler,” “Alaska Maid,”

“Acropolis,” “Northern Star,” “Northern Light No. 2,” and other desirable properties and provide for any proper machinery, buildings and equipment for working and operating such mines and properties and ores and products [60] therefrom, and to fix the terms of payment by an issue of said increased stock or otherwise.

IV.

To see what action the stockholders will take concerning the first mortgage bond now outstanding and the payment thereof.

V.

To see if the stockholders will authorize a new issue of \$500,000.00 or corporate bonds to be used for the retiring the \$200,000.00 of mortgage bonds now outstanding, the liquidation of the floating indebtedness and development and prosecution of the business of the corporation as required; said new issue to be secured by a trust mortgage of all the mines, mining claims and properties, including those mentioned in Art. III, mills, millsites, water rights, real estate, machinery and equipment of this corporation in Alaska, and to fix all the terms and conditions of said bonds and mortgage.

VI.

To do any other business which may come before said meeting concerning the matters above named, or

otherwise take and authorize all proper action regarding the same.

THOMAS S. NOWELL,
President,
WALLACE HACKETT,
HENRY ENDICOTT,
A. C. HOWARD,
A. HOBART,
THOMAS S. NOWELL,
Directors.'

That in pursuance of said notice hereinabove set forth and on the 24th day of June, 1896, a meeting of the stockholders of Berner's Bay Mining and Milling Company was held at No. 30 [61] Exchange Street, in the city of Portland, Maine, at which meeting it was voted to increase the capital stock of said corporation from one million dollars (\$1,000,000.00) to two million five hundred thousand dollars (\$2,500,000.00) and all the proposed increase of capital stock, to wit: One million five hundred thousand dollars (\$1,500,000.00) was voted to be delivered to said defendants, Thomas S. Nowell and Willis E. Nowell, in accordance with the said written offer in findings hereof referred to, and authorized the increase of the bonded indebtedness of the company from two hundred thousand dollars (\$200,000) to five hundred thousand dollars (\$500,000) as in the said offer of June 3d, 1896, and in the said notice of corporate meeting proposed.

XIV.

That at said meeting of June 24th, 1896, the said Thomas S. Nowell caused to be prepared a written offer addressed to the Berner's Bay Mining and Mill-

ing Company, duly subscribed in writing by the said Thomas S. Nowell, wherein and whereby he offered, acting for himself and as the attorney in fact and agent of the said defendant, Willis E. Nowell, to sell, convey or cause to be conveyed to the said Berner's Bay Mining and Milling Company the fifteen mining claims and properties named in article III of the call for the special meeting of June 24th, 1896, for and in consideration of fifteen thousand (15000) shares of the new stock of said corporation of the par value of one hundred dollars (\$100.00) each. That thereafter said corporation, Berner's Bay Mining and Milling Company accepted said offer and paid to said defendants, Thomas S. Nowell and Willis E. Nowell, the full consideration and purchase price for said fifteen claims, as hereinabove described, and said Berner's Bay Mining and Milling Company issued to the said defendant, Thomas S. Nowell, five thousand shares (5000) of the capital stock of said corporation at one hundred dollars (\$100) per share, and [62] to the said defendant, Willis E. Nowell, ten thousand shares of the capital stock of said corporation at one hundred dollars (\$100) per share. That on said 24th day of June, 1896, the said corporation, Berner's Bay Mining and Milling Company, at said stockholders' meeting held at No. 30 Exchange Street in the city of Portland, State of Maine, by its stockholders and officers and the corporate acts aforesaid, purchased and became the equitable owner of said three mining claims known as the Johnson Group, to wit: the said Northern Light, or Johnson, Northern Light Extension No. 1, or Emma, and Northern Light Extension

No. 2 Lode Mining Claims as above described and referred to, and thence hitherto has continued and now is the equitable owner thereof; and the said defendants, Thomas S. Nowell and Willis E. Nowell, thereafter received the full consideration and purchase price therefor in accordance with the terms of said written offer hereinabove set forth, and that said three claims known as the Johnson Group then constituted the principal consideration for the issuance of said corporate stock and the increase of said corporate indebtedness.

XV.

That some time subsequent to the said 24th day of June, 1896, the corporate records of said Berner's Bay Mining and Milling Company were so altered, changed and falsely entered as to make it appear that in the transactions at the corporate meeting of June 24th, 1896, only twelve of the fifteen mining claims enumerated and set forth in said written offer and said notice of stockholders' meeting had been offered and transferred to said corporation, Berner's Bay Mining and Milling Company, and said group of claims known as the Johnson Group consisting of the said Northern Light, or Johnson, Northern Light Extension No. 1 or Emma, and Northern Light Extension No. 2 lode mining claims, were wrongfully, fraudulently and falsely made to appear on the records of said corporation as having been omitted from said offer [63] and transfer by the wrongful and fraudulent insertion in a pretended offer of sale recorded in the minutes of said stockholders' meeting of June 24th, 1896, of the

words 'last twelve' and by the insertion in said minutes of a pretended false and simulated copy of an offer on the face of which appears other substantial changes both in form and substance of the said offer as originally presented and acted upon at said meeting, by which the true intent and meaning of the said transaction was wrongfully and fraudulently changed and altered so as to appear to transfer only twelve of the fifteen claims, omitting said Johnson Group. That during the times when said alterations were made and when said corporate records were falsely engrossed so as to apparently effect said change in said transaction, the books of said corporation including the record books and records, papers and proceedings thereof were in the custody and control of the said defendant Thomas S. Nowell, and the said assistant treasurer and assistant clerk of the said corporation, the said Arthur L. Nowell, now deceased, at the general office of said corporation situated in Boston, Massachusetts, where the eastern business and financial transactions of said corporation were conducted.

That thereafter and in pursuance of a scheme and conspiracy on the part of the said defendants, Thomas S. Nowell and Willis E. Nowell, to defraud the said Berner's Bay Mining and Milling Company and its creditors and stockholders the said Thomas S. Nowell and Willis E. Nowell pretending to act under the false and fraudulent entries in said corporate books, failed, neglected and refused to convey to said corporation, Berner's Bay Mining and Milling Company, the said three claims known as the

Johnson Group, to wit: Northern Light, or Johnson, Northern Light Extension No. 1, or Emma, and Northern Light Extension No. 2. [64]

XVI.

The defendants, Thomas S. Nowell and Willis E. Nowell, although present in court at the trial, did not testify as to the alterations in the offer introduced in evidence as Plaintiffs' Exhibit 'D' as the same appears engrossed in the books of the company, nor did defendants offer any explanation in regard thereto.

XVII.

That from the 12th day of February, 1898, until the 3d day of January, 1906, Frederick D. Nowell, one of the plaintiffs herein, was sole receiver of the property and assets of the said Berner's Bay Mining and Milling Company, and that he, the said Frederick D. Nowell, was a son of the defendant, Thomas S. Nowell, and a brother of the defendant, Willis E. Nowell and of the said Arthur L. Nowell, now deceased, and a stockholder and incorporator of the Alaska Nowell Gold Mining Company, one of the defendants herein, and that until shortly prior to the commencement of this action the failure of the defendants herein to convey the said Johnson Group, and the facts in connection therewith were not reported to this court; and that on the 6th day of January, 1906, W. B. Hoggatt was appointed a coreceiver herein for the express purpose of commencing this action, and on account of the relationship existing between the said Frederick D. Nowell and the parties defendant herein. That this action

has been brought and prosecuted with due diligence after the discovery of the facts upon which it is based, and after the said facts were disclosed to this court.

XVIII.

That since said 24th day of June, 1896, said defendants, Thomas S. Nowell, Willis E. Nowell, Nowell Mining and Milling Company, and the Alaska Nowell Gold Mining Company, have held the legal title to said three mining claims above described, known as the Johnson Group, in trust for the use and benefit of the [65] said Berner's Bay Mining and Milling Company, its stockholders and creditors.

XIX.

That some time prior to the 25th day of May, 1900, the defendants Thomas S. Nowell and Willis E. Nowell organized and caused to be organized under the laws of the State of Maine, a corporation known as the Nowell Mining and Milling Company, one of the defendants herein. That said corporation was organized with a capital stock of one million dollars (\$1,000,000), consisting of ten thousand (10,000) shares at one hundred dollars (\$100.00) each per share. That the said defendant, Thomas S. Nowell, was chosen its first president and thence hitherto has continued as such. That the said defendant, Thomas S. Nowell, during the time in these findings referred to, held one share of the stock of the said Nowell Mining and Milling Company, and the said Willis E. Nowell likewise held and controlled nine thousand nine hundred and ninety-seven shares of said stock.

XX.

That after the date of the organization of said defendant, Nowell Mining and Milling Company, and prior to the 10th day of December, 1902, in pursuance of said conspiracy to defraud said Berner's Bay Mining and Milling Company, said defendant, Willis E. Nowell, transferred and conveyed to the said Nowell Mining and Milling Company the said Johnson Group of claims, but said transfer and conveyance was without consideration, and with a full knowledge and notice on the part of the said defendant corporation, Nowell Mining and Milling Company, of all acts, facts and transactions in connection with the sale of said properties to the Berner's Bay Mining and Milling Company, and claims of said Berner's Bay Mining and Milling Company, its stockholders and creditors, in and to said property. That in pursuance of said conspiracy, and in order to defraud and deprive said corporation, Berner's Bay Mining and Milling Company, of said [66] claims as aforesaid, the defendants, Thomas S. Nowell and Willis E. Nowell caused the Nowell Mining and Milling Company to make an application and take the preliminary steps in the United States Land Department to secure a United States patent for said claims, to be issued to said defendant, Nowell Mining and Milling Company. That said application and preliminary steps were taken, carried on and conducted entirely *ex parte* by the said Nowell Mining and Milling Company and the said defendants, Thomas S. Nowell and Willis E. Nowell, and the same were had during the pendency of the receivership herein and without any

report thereof to the court in which said receivership was pending by the said Frederick D. Nowell, who acted as the sole receiver of the said Berner's Bay Mining and Milling Company, and such proceedings were had on the 10th day of December, 1902, the United States of America issued to the defendant Nowell Mining and Milling Company, its letters patent for said claims, to wit, the Northern Light, or Johnson, Northern Light Extension No. 1, or Emma, Northern Light Extension No. 2. That said defendant, Nowell Mining and Milling Company, took said patent and acquired said lands with full knowledge and notice of the transactions herein found in connection with the sale of said mining properties to Berner's Bay Mining and Milling Company.

XXI.

That on the 20th day of August, 1903, the defendants, Thomas S. Nowell, Willis E. Nowell and the plaintiff Fred. D. Nowell, the receiver of Berner's Bay Mining and Milling Company, organized and incorporated the Alaska Nowell Gold Mining Company, which by an amendment to its charter, authorized a capital stock to be issued consisting of fifty-five thousand (55,000) shares at one hundred dollars (\$100) per share, of which capital stock there was issued to the defendant, Willis E. Nowell, forty-nine thousand nine hundred and ninety-six (49,996) shares at one [67] hundred dollars per share. That said corporation was organized for the purpose of taking over the title to said Johnson Group, which was thereafter transferred from the Nowell Mining and Milling Company to the Alaska Nowell Gold Mining Com-

pany, but without consideration and with full notice of the rights of the Berner's Bay Mining and Milling Company, and of the facts hereinabove found in reference to the transaction of June 24, 1896, and said legal title is now held by said Alaska Nowell Gold Mining Company in trust for the use and benefit of Berner's Bay Mining and Milling Company, its stockholders and creditors.

Conclusions of Law [in D. C. No. 519-A].

As conclusions of law from the foregoing facts the Court now finds and decides as follows:

I.

That those three certain mining claims known as the Johnson Group, called the Northern Light or Johnson, Northern Light Extension No. 1, or Emma, and Northern Light Extension No. 2, as particularly referred to in the foregoing findings and as particularly bounded and described in Finding XI thereof, were sold by the defendants, Thomas S. Nowell and Willis E. Nowell, to Berner's Bay Mining and Milling Company, the corporation above referred to, in the month of June, 1896, and that said corporation at that time paid to said defendants the full and agreed consideration and purchase price therefor, and that said Berner's Bay Mining and Milling Company, a corporation, is the true and equitable owner of said three mining claims, and entitled to a conveyance thereof.

II.

That said three mining claims were transferred by the said defendants, Thomas E. Nowell and Willis E. Nowell, to the Nowell Mining and Milling Company,

a corporation, and one of the defendants herein, without consideration and with full knowledge and [68] notice of the rights and equities of the said Berner's Bay Mining and Milling Company, a corporation, in and to said property, and said defendant, Nowell Mining and Milling Company, subsequently conveyed the same three mining claims to the Alaska Nowell Gold Mining Company, without consideration and with like full knowledge and notice of the rights and equities of said Berner's Bay Mining and Milling Company, a corporation.

III.

That said defendant, Alaska Nowell Gold Mining Company, a corporation, now holds said same three mining claims under said conveyance in trust for the use and benefit of said Berner's Bay Mining and Milling Company, its stockholders and creditors.

IV.

That John C. McBride, the substituted party plaintiff herein, and who is now the sole receiver of the properties of said Berner's Bay Mining and Milling Company, in Cause No. 603, which is now pending in this court, is entitled to receive said conveyance for and on behalf of said corporation, said Berner's Bay Mining and Milling Company, and is entitled to enter into the possession of said property for the benefit of said corporation, Berner's Bay Mining and Milling Company, subject to the orders of this court.

V.

That said defendant, Alaska Nowell Gold Mining Company, a corporation, should be decreed to execute to said Berner's Bay Mining and Milling Company, a

corporation, a good and sufficient deed of conveyance conveying the legal title to said same three mining claims, and deliver said deed to said John C. McBride within such time as this Court shall direct by its decree herein, or in case said defendant, Alaska Nowell Gold Mining Company, fails to so execute and deliver said deed within the time so limited, then that a Master be appointed by this Court, upon application thereto in that behalf, to execute and deliver such deed for the benefit of said corporation, Berner's Bay Mining and Milling Company, its stockholders and creditors. [69]

VI.

That the said defendant, Thomas S. Nowell, and the said defendant, Willis E. Nowell, and the said defendant Nowell Mining and Milling Company, have no interest in, lien upon or claim against said same three mining claims as herein referred to.

VII.

That the plaintiff recover its costs and disbursements herein as the same shall be taxed by this Court.

Let a decree be entered accordingly.

Dated this 9th day of January, 1907.

ROYAL A. GUNNISON,
Judge."

No. 519-A.

“JOHN C. McBRIDE, Receiver of the Property of
BERNER'S BAY MINING AND MILLING
COMPANY, a Corporation, Substituted for
F. D. NOWELL and W. B. HOGGATT, as
They were Receivers of the Property of
BERNER'S BAY MINING AND MILLING
COMPANY, a Corporation, and HENRY
ENDICOTT, Intervenor,

Plaintiffs,

vs.

THOMAS S. NOWELL, WILLIS E. NOWELL,
NOWELL MINING AND MILLING COM-
PANY, a Corporation, and ALASKA
NOWELL GOLD MINING COMPANY,

Defendants.

Decree for Specific Performance [in D. C. No. 519-A].

This cause came on regularly for trial on the 27th day of April, 1906, before the Court sitting without a jury.

The plaintiffs, F. D. Nowell and W. B. Hoggatt, as they were then receivers of the property of Berner's Bay Mining and Milling Company, plaintiffs herein, and Henry Endicott, the intervenor, one of the plaintiffs herein, were represented and appeared by Messrs. Shackelford & Lyons and John J. Boyce, their attorneys, and substituted plaintiff, to wit, John C. McBride, the present receiver of the property of Berner's Bay Mining and Milling Company, a corporation, who was, pending the submission of said cause, substituted by an order of this court in place

of the said receivers, F. D. Nowell and W. [70] B. Hoggatt was represented and appeared herein by said Shackleford & Lyons and John J. Boyce, his attorneys; and the defendants, Thomas S. Nowell, Willis E. Nowell, Nowell Mining and Milling Company, a corporation, and Alaska Nowell Gold Mining Company, a corporation, were represented and appeared herein by their attorneys, Messrs. Malony & Cobb.

Whereupon certain witnesses were sworn and examined, and certain depositions and documentary evidence were introduced upon the part of the respective parties, and certain stipulations, as they appear upon the record, were made by and on behalf of the respective parties in open court, and said causes having been tried and submitted to the Court for consideration and decision, and having been fully argued by counsel for the respective parties, and upon said submission the Court having duly considered the same and the pleadings, evidence and stipulations aforesaid, the Court, on the 5th day of January, 1907, rendered and filed its memorandum of decision in writing, and being fully advised in the premises, and having made, filed and entered herein its findings of fact and conclusions of law separately stated, and ordered judgment accordingly;

And it now appearing to this Court from the pleadings in said action and upon the evidence introduced and the profits offered herein, and by reason of said decision and said findings of fact and conclusions of law as aforesaid, that the plaintiffs herein are entitled to a specific performance of the contract found and described in said findings, and that those three

certain mining claims known as the Johnson Group, particularly referred to and described in said findings, were sold by the defendants, Thomas S. Nowell and Willis E. Nowell, to Berner's Bay Mining and Milling Company, the corporation referred to and described in said findings, in the month of June, 1896, and that said property should be conveyed by the defendant, Alaska Nowell Gold Mining Company, the present holder thereof, to said Berner's [71] Bay Mining and Milling Company, a corporation, and the deed thereof delivered to the plaintiff, John C. McBride, as he is the receiver of the property of said corporation, Berner's Bay Mining and Milling Company, and that said defendants, Thomas S. Nowell Willis E. Nowell and Nowell Mining and Milling Company have no interest therein, and that the defendant, Alaska Nowell Gold Mining Company, now holds the naked, legal title thereof in trust for said corporation, Berner's Bay Mining and Milling Company;

Now, therefore, by reason of the law and the findings aforesaid, on motion of Messrs. Shackleford & Lyons and John J. Boyce, the attorneys for the plaintiffs herein, it is now,

Ordered, adjudged and decreed that the said three mining claims known as the Johnson Group, called 'Northern Light or Johnson,' 'Northern Light Extension No. 1, or Emma,' and 'Northern Light Extension No. 2,' as hereinafter more particularly bounded and described in this decree were sold by the defendants, Thomas S. Nowell and Willis E. Nowell to Berner's Bay Mining and Milling Com-

pany, a corporation, herein and in said findings referred to, in the month of June, 1896, and that said corporation at that time paid to said defendants the full and agreed consideration and purchase price therefor, and said corporation, Berner's Bay Mining and Milling Company, is the true and equitable owner of said three mining claims and entitled to a conveyance thereof. That said three mining claims are situated in the vicinity of Berner's Bay, on Lynn Canal, Alaska, and within the district of Alaska, Division Number One, and within the jurisdiction of this court, and within the Juneau Recording Precinct, and are more particularly bounded and described as follows:

Northern Light: Beginning at corner No. 1 from which U. S. Mineral Monument No. 1, bears south 25 degrees 3 minutes west, 3,983 feet distant and mouth of a joint tunnel bears north [72] 39 degrees 6 minutes west, 1,789.3 feet distant; thence north 41 degrees 15 minutes east 460 feet to witness corner No. 2; 600 feet to corner No. 2; thence north 48 degrees 45 minutes west, 1,450 feet to witness corner to corner No. 3, 1,500 feet to corner No. 3; thence south 41 degrees 15 minutes west 300 feet to discovery point; 600 feet to corner No. 4; thence south 48 degrees 45 minutes east, 1,500 feet to corner No. 1, the place of beginning.

Northern Light Extension No. 1 or Emma: Beginning at corner No. 1, from which U. S. Mineral Monument bears south 45 degrees 59 minutes west, 3,832 feet distant; thence north 41 degrees 15 minutes east 600 feet to corner No. 2; thence north 48 degrees

45 minutes west, 1105 feet to witness corner to corner No. 3; 1298 feet to corner No. 3, identical with corner No. 2 of Northern Light; thence south 41 degrees 15 minutes west, 600 feet to corner No. 4, identical with corner No. 1 of said Northern Light; thence south 48 degrees 45 minutes east, 1297 feet to corner No. 1, the place of beginning.

Northern Light Extension No. 2: Beginning at corner No. 1, identical with corner No. 4 of Northern Light from which U. S. Mineral Monument No. 1 bears south 6 degrees 56 minutes west, 4,638.4 feet distant, and the mouth of a joint tunnel bears north 6 minutes west 399.6 feet distant thence north 48 degrees 45 minutes west, 807 feet to witness corner to corner No. 2; 1500 feet to corner No. 2; thence north 41 degrees 15 minutes east 600 feet to corner No. 3; thence south 48 degrees 45 minutes east, 357.6 feet to witness corner to corner No. 3, 1125.6 feet to witness corner to corner No. 4; 1500 feet to corner No. 4; thence south 41 degrees 15 minutes west, 600 feet to corner No. 1, the place of beginning; said lot No. 380 containing 59.19 acres, more or less. As the same appears in letters patent of the United States of America to Nowell Mining and Milling Company, [73] dated the 10th day of December, 1902, and recorded in book 19 of Deeds, at page 360, of the Records of the Juneau Recording District.

And it is further ordered, adjudged and decreed that said three mining claims, hereinabove referred to and particularly described, were transferred by said defendants, Thomas S. Nowell and Willis E. Nowell, to the defendant, Nowell Mining and Milling

Company, a corporation, without consideration and with full knowledge and notice of the rights and equities of said Berner's Bay Mining and Milling Company, a corporation, in and to said property, and that said defendant, Nowell Mining and Milling Company subsequently conveyed the same three mining claims to the defendant corporation, Alaska Nowell Gold Mining Company, without consideration and with like knowledge and notice of the rights and equities of said Berner's Bay Mining and Milling Company, a corporation, and that said last-named defendant, to wit, Alaska Nowell Gold Mining Company, a corporation, now holds said same three mining claims under said conveyance in trust for the use and benefit of said Berner's Bay Mining and Milling Company, a corporation, its stockholders and creditors.

And it is further ordered, adjudged and decreed that said defendant last above named, to wit, Alaska Nowell Gold Mining Company, a corporation, do, by appropriate corporate action, execute to said Berner's Bay Mining and Milling Company, a corporation, a good and sufficient deed of conveyance, conveying the legal title to said same three mining claims as hereinabove particularly described and referred to in this decree, and that said defendant corporation, to wit, Alaska Nowell Gold Mining Company, do, within thirty days, execute said deed and deliver the same to the above named plaintiff, John C. McBride, as he is receiver of the property of the Berner's Bay Mining [74] and Milling Company, a corporation.

And it is further ordered, adjudged and decreed that in case of the default and failure of said defendant corporation, Alaska Nowell Gold Mining Company to so execute and deliver said deed within said time so limited, to wit, thirty days, then that upon application therefor to this Court a Master be appointed by this Court to execute, in the name of said corporation, and as its act and deed, a good and sufficient deed conveying the legal title to said same three mining claims to said corporation, Berner's Bay Mining and Milling Company, and deliver such deed for the benefit of said corporation, its stockholders and creditors, to the said John C. McBride, one of the plaintiffs herein, as he is the receiver of the property of Berner's Bay Mining and Milling Company, a corporation.

And it is further ordered, adjudged and decreed, that the said defendant, Thomas S. Nowell, and the said defendant, Willis E. Nowell, and the said defendant, Nowell Mining and Milling Company, have no interest in, lien upon, or claim against said three mining claims as hereinabove in this decree referred to and particularly described.

And it is further ordered, adjudged and decreed that the plaintiffs herein do have and recover their costs and disbursements expended herein in this action hereby taxed at the sum of ———.

To all of which said decree defendants by their counsel duly accepted.

Done in open court this ninth day of January, 1907.

ROYAL A. GUNNISON,
District Judge."

X.

Plaintiffs further show to the Court that the said Berner's Bay Mining and Milling Company was organized about the year 1892; that the defendants Henry Endicott, Wallace Hackett, and S. W. Fairchild [75] were at all times herein mentioned stockholders and directors of said company; that the defendant William Endicott was a shareholder therein; that the capital stock of said company from the date of its organization until the month of June, 1896, was one million dollars (\$1,000,000); that in 1892, the said company bonded all its properties in Alaska, consisting of a large number of mining claims situated near Berner's Bay on Lynn Canal about sixty (60) miles north of Juneau, in said District of Alaska, to secure the payment of two hundred (200) bonds of the denomination of one thousand (\$1,000) dollars each, and gave a mortgage deed in trust of said properties to the defendant International Trust Company to secure the payment of said bonds; that in the year 1896, said company became unable to pay its current running expenses and debts then accrued; that on or about the 15th day of December, 1897, in a suit numbered 603 upon the docket of the then United States District Court for the District of Alaska, said Court appointed a receiver of all the properties of said company, naming one E. F. Cassell as receiver; that said E. F. Cassell in the month of February, 1898, resigned as such receiver and Frederick D. Nowell was appointed in the place and stead of the said E. F. Cassell; that the said F. D. Nowell acted as such re-

ceiver in said suit No. 603, from the 12th of February, 1898, until the 27th day of September, 1906.

XI.

That during the years from 1898 to 1905, both inclusive, said receiver F. D. Nowell, acting under orders of the said United States District Court, and with the consent, advice, assistance, and active procurement of the said Henry Endicott, William Endicott, Wallace Hackett, and other stockholders and bondholders and directors of said company, issued receiver's certificates and contracted indebtedness as receiver of the said company aggregating about four hundred thousand dollars (\$400,000), including interest, all of which said indebtedness was by the orders of the Court authorizing the same, and with the consent of the said Henry Endicott and William Endicott, Wallace [76] Hackett, and other stock and bondholders of said company, declared to be a prior and paramount lien upon the properties of the said company.

XII.

That at the time, in 1898, of the appointment of the said F. D. Nowell as receiver, the said properties of the said Berner's Bay Mining and Milling Company were with the exception of the Comet mine almost wholly undeveloped, which said undeveloped state of the properties of the said company was in great part due to the large number of mining lode claims (about forty-five (45) or fifty (50) mining lode claims), and was further in large part due to the immensity and great extent of the ore deposits contained in said mining lode claims, and being thus

almost wholly undeveloped, they were of uncertain and speculative value, and for that reason could not at that time have been sold for a sum of money sufficient to pay more than a very small proportion of the indebtedness of the said company, but the directors and principal stockholders and creditors of said company, and especially the said Henry Endicott and Wallace Hackett, were of the opinion that by developing the same, the said properties could be shown and proved to be of a very large value, and could be made sufficiently productive to pay off said indebtedness and leave a large profit to the stockholders of the said company; that by the expenditure of the moneys raised by the receiver in contracting the indebtedness aforesaid, said receiver did develop said properties by driving a certain cross-cut tunnel, known as the Kensington cross-cut tunnel to a point where it intersected two certain lodes, known as the Eureka and Kensington lodes, and by doing other work and making other improvements; that the said development work which was done by the said receiver F. D. Nowell was successful in demonstrating and proving that the said properties were of a large net value, to wit, to an estimated net value aggregating about two million seven hundred thousand dollars (\$2,700,000); that the said development work was completed [77] about December, 1904.

XIII.

That in the year and on or about July 1st, 1896, the said Berner's Bay Mining and Milling Company executed another mortgage to the said International Trust Company upon all its said properties to secure

five hundred bonds (500) of a denomination of one thousand dollars (\$1,000) each, and with a portion of the proceeds thereof retired either by purchase or exchange the two hundred (200) bonds of the issue of 1892 theretofore outstanding; that the defendants William Endicott and his brother Henry Endicott and Wallace Hackett were holders of a large number of said bonds, and subsequently to the appointment of a receiver of the said company and during the times of the issuance of receiver's certificates as hereinbefore set forth, the said William and Henry Endicott became the purchasers and holders of a large amount of the receiver's certificates aforesaid.

XIV.

That the said properties known as and called the "Johnson Group" and particularly described in the Bill of Complaint and Decree aforesaid, lie adjacent to, in the same general mineral belt as the properties of the said Berner's Bay Mining and Milling Company; that the said "Johnson Group" is situated or lies farther back from tide-water and nearer the summit of the mountains of the Berner's Bay peninsula than the properties of the said Berner's Bay Mining and Milling Company; that a continuation of the said Kensington crosscut tunnel for a distance of about two thousand six hundred (2,600) feet from the point where it has intersected the said Kensington lode would cause the said Kensington cross-cut tunnel to cross-cut the said "Johnson Group"; that the said "Johnson Group" was of great intrinsic value and so situated as to be of great prospective value to the owners of said properties of the Ber-

ner's Bay Mining and Milling Company.

XV.

And these plaintiffs further allege and show the Court that in [78] the year 1905, shortly after the completion of the development work by the receiver aforesaid and the demonstration thereby of the great value contained in the ore bodies lying within the properties and mining claims of the said Berner's Bay Mining and Milling Company, the said Henry and William Endicott, Wallace Hackett, C. R. Corning, R. McM. Gillespie, and S. W. Fairchild and other persons to the plaintiffs unknown, entered into a fraudulent conspiracy and scheme in the form of an ostensible plan of reorganization of the said company, dated at New York, April twentieth (20th), 1905, the object and purpose of which said conspiracy being to defraud the Berner's Bay Mining and Milling Company, its creditors and stockholders, other than certain ones of the said conspirators themselves, out of all the property and all the beneficial interest therein of the said company and secure the title to the same for themselves without any consideration whatsoever being paid therefor; that the means by which said conspiracy, cheat, and fraud were to be carried out and consummated were substantially as follows, to wit:

The said William and Henry Endicott, Wallace Hackett and their co-conspirators agreed to and in pursuance to said purpose did transfer to the defendants Corning, Gillespie, and Fairchild, who were styled the "Reorganization Committee of the Berner's Bay Mining and Milling Company," all the

bonds and receiver's certificates of the said company held by said conspirators alleged by them to aggregate about four hundred thousand dollars (\$400,000) face value of bonds and about one hundred and forty thousand dollars (\$140,000) face value of said receiver's certificates, and the said so-called "Reorganization Committee" were to organize a new corporation with an ostensible capital stock of three million dollars (\$3,000,000) common stock and one million dollars (\$1,000,000) preferred stock; said Reorganization Committee were then to induce all the creditors, secured and unsecured, of the said Berner's Bay Mining and Milling Company and all the creditors of the said receivership to transfer [79] their evidences of indebtedness to them together with the title to such indebtedness in exchange for stock of the said new corporation, but the said Reorganization Committee were to retain, ostensibly for services rendered, a majority of the stock and thereby have absolute control of the said new corporation; it was furthermore agreed and intended that said Corning, Gillespie, and Fairchild should advance or cause to be advanced to the said new corporation the sum of one hundred and fifty thousand dollars (\$150,000) in cash and procure the same to be secured by a first mortgage upon said property to themselves or some of them for two hundred and fifty thousand dollars (\$250,000).

Plaintiffs further show and allege that it was proposed and intended that when the property of the said Berner's Bay Mining and Milling Company should have been cleared of all encumbrances and

liens by the assignment and transfer of the said evidences of indebtedness against it to the said Reorganization Committee and the release of the mortgage aforesaid, and the discharge of the receivership aforesaid, that the said property should be conveyed to said new corporation, thereby vesting said new corporation with a good and unencumbered title to all the said property, save and except the mortgage lien held by said Reorganization Committee and their associates for the sum of two hundred and fifty thousand dollars (\$250,000) aforesaid, which said lien for said amount they were to obtain for the said loan of one hundred and fifty thousand dollars (\$150,000) only, to the said new corporation.

Plaintiffs further show and allege that it was further proposed and intended, after having thus made themselves sole mortgage lien holders and having become vested as majority stockholders with the sole and entire management of said new corporation so owning said property, said Reorganization Committee and their associates and co-conspirators proposed and intended to expend said one hundred and fifty thousand dollars (\$150,000) in paying themselves for services and expenses of reorganization and doing such development [80] work upon said property as they saw fit; that the said Reorganization Committee well knew that the amount of cash to be raised and provided by them for the benefit and use of the said new corporation, to wit: the sum of one hundred and fifty thousand dollars (\$150,000) was entirely inadequate to pay their charges for services and reorganization expenses and put the new company on

a paying basis; that the said Reorganization Committee did incur reorganization expenses, did make disbursements for the costs of litigation, and did demand charges for their services as such Reorganization Committee amounting to and aggregating the sum of one hundred and fifteen thousand dollars (\$115,000) and upwards; that the said plan of reorganization of the Berner's Bay Mining and Milling Company made no provision for the raising of cash other than the said sum of one hundred and fifty thousand dollars (\$150,000) to be obtained by the sale of the said two hundred and fifty thousand dollars (\$250,000) of mortgage bonds of the said new corporation; that the said Reorganization Committee and their associates as the sole mortgage lien holders and majority stockholders of the said new corporation did not intend and propose to make said properties productive or provide or have said new corporation provide any means for the payment of said mortgage, and when the same became due and payable they proposed and intended to foreclose the same by judicial proceedings or otherwise, well knowing that such foreclosure was inevitable by reason of the total inadequacy of the amount of cash capital that would be available to the new corporation, as hereinbefore shown and alleged and, in the meantime, by reason of the seeming failure of the enterprise as a mining venture, so to deceive the public generally and the persons interested as stockholders in said new corporation, that said property at said foreclosure sale would not sell for more than sufficient to pay their said mortgage, and the said Re-

organization Committee and their co-conspirators thereupon proposed and intended to purchase the said property for the amount of the said mortgage debt by bidding in their [81] said mortgage bonds and thereby secure a clear and unencumbered title thereto for the benefit of themselves and their co-conspirators for no other consideration whatsoever than the expenditure of money in paying themselves for their services and expenses in behalf of said conspiracy and in improving the said properties they so proposed to acquire.

XVI.

Plaintiffs further show and allege and aver the truth to be that during all the times since the year 1898 they and their grantors have been the owners in fee simple of the said three lode mining claims hereinbefore described and known as the "Johnson Group." Plaintiffs further show and allege that the said Johnson Group was patented to the plaintiff Nowell Mining and Milling Company in the year 1902 and thereafter conveyed to the plaintiff Alaska Nowell Gold Mining Company; that the plaintiffs Thomas S. Nowell and Willis E. Nowell and other members of the Nowell family, were the owners of all the capital stock of said last two named companies; that the said Thomas S. Nowell, Willis E. Nowell, and the said F. D. Nowell, receiver aforesaid, were the owners of upwards of sixty thousand dollars (\$60,000) of the indebtedness of the receiver of the said Berner's Bay Mining and Milling Company.

XVII.

Plaintiffs further show and allege that in the summer of the year 1905, the defendant C. R. Corning, as agent and acting in the interest of the defendants and their co-conspirators, visited Alaska and attempted to carry out said reorganization scheme by attempting to deceive these plaintiffs and other Alaskan creditors of said receivership as to their real purpose and thereby persuade them to assign and transfer to the said Reorganization Committee all evidences of indebtedness which these plaintiffs and said other Alaskan creditors owned and held against the said receivership in exchange for shares of stock in the said new corporation which was to be organized [82] by the said Corning-Gillespie-Fairchild Reorganization Committee; that these said plaintiffs, Thomas S. Nowell and Willis E. Nowell and the said receiver F. D. Nowell and certain other creditors of said receivership, obtained notice and information of the fraudulent purposes and schemes of the said defendants and their co-conspirators and declined and refused to assign and transfer to the said Reorganization Committee their said evidences of indebtedness, or to join in the said reorganization plan of the said committee, or to have anything to do with the proposed new corporation, for the reason that the said Thomas S. Nowell and Willis E. Nowell were of the opinion and from actual experience of about ten years in extent concerning the management and operation of the properties of the said Berner's Bay Mining and Milling Company had good reason to believe, and did believe, that the said reorganization

plan of the said Berner's Bay Mining and Milling Company did not offer a satisfactory or equitable settlement of the claims of the creditors of the said company, inasmuch as the said sum of one hundred and fifty thousand dollars (\$150,000) of new capital in cash which under the terms of said reorganization plan was the total amount of new cash to be made available to the said new company was entirely inadequate to pay the expenses of the said Reorganization Committee as provided in their plan and agreement, to pay the expenses of closing up the receivership litigation and further to leave a sufficiently large balance of cash in the treasury of the said new corporation to carry on and pay for the adequate and proper development and equipment of such an enormously large and extensive mining enterprise, whereby the original creditors of the said Berner's Bay Mining and Milling Company, by having accepted in exchange for their liens and claims against the said company the subordinate and secondary equities offered by the said Reorganization Committee in the said new corporation, would be constantly menaced with the foreclosure of the said mortgage for two hundred and fifty thousand dollars (\$250,000) and the consequent total [83] destruction of their said subordinate and secondary equities which they had accepted or acquired in the said new corporation, whereby the said Reorganization Committee and their associates and co-conspirators who had advanced the said sum of one hundred and fifty thousand dollars (\$150,000) of cash to the said new company would become the

absolute owners in fee simple of the properties of the said Berner's Bay Mining and Milling Company without having paid a dollar therefor to the real and just creditors of the said company; that the said C. R. Corning also attempted to induce the then receiver F. D. Nowell to join with him in persuading the creditors of the said receivership to transfer their said evidence of indebtedness to the said Reorganization Committee, and it was promised and agreed by the said Reorganization Committee that if the said receiver would do so, all his claims for services and compensation as such receiver should be paid in full without question, but the said F. D. Nowell, animated by a sense of duty to the creditors of said receivership and of the said company, and for the same reasons that actuated the said Thomas S. Nowell and Willis E. Nowell as above alleged and set out, also declined and refused to have anything to do with the said Reorganization Committee or to join or aid them in their said plan and scheme.

XVIII.

Plaintiffs further allege and show that owing to the great value of the said "Johnson Group" the said C. R. Corning, R. McM. Gillespie and S. W. Fairchild and their co-conspirators were very desirous that the said "Johnson Group" should be included in their said fraudulent plan of reorganization of the said Berner's Bay Mining and Milling Company, and for the purpose of inducing the said Thomas S. Nowell and Willis E. Nowell to consent to join with them in their said plan of reorganization and convey or cause to be conveyed the said "Johnson Group"

to the new company to be organized pursuant to said plan of reorganization it was provided in the terms of said plan of reorganization [84] that two hundred and fifty thousand dollars (\$250,000) par value of the common stock of the said proposed new company should be set aside for the "purchase of the unencumbered title to the Johnson properties," when the above-named defendants and their co-conspirators at the time well knew that they intended to render said common stock valueless by a foreclosure of the said mortgage for two hundred and fifty thousand dollars (250,000), whereby the said conspirators would then become the absolute owners in fee simple of the said "Johnson Group" without having paid a dollar of consideration to the real and true owners of the same.

Plaintiffs further allege and show that the defendants herein, for the sole and specific purpose of coercing and compelling the said plaintiffs Thomas S. Nowell and Willis E. Nowell and the receiver Frederick D. Nowell into joining the said scheme and plan of reorganization of the said Berner's Bay Mining and Milling Company and becoming depositors thereunder and agreeing to convey the said "Johnson Group" to the said new corporation in consideration of the said two hundred and fifty thousand dollars (\$250,000) par value of common stock of the said new corporation and aiding these defendants in the fraud which it was intended by the said Reorganization Committee and their co-conspirators and associates should be perpetrated upon the unsuspecting rightful creditors of the said Berner's Bay

Mining and Milling Company and of the said receivership, the defendants herein thereupon procured the said defendants, C. R. Corning, R. McM. Gillespie and S. W. Fairchild, being the said Reorganization Committee, to institute the said suit No. 519-A on the docket of this court; that in the furtherance and promotion of their said plan of reorganization and fraudulent scheme the said Reorganization Committee have carried on and prosecuted the gigantic course of litigation that, since the year 1905, has been carried on and prosecuted and directed in particular against the said Thomas S. Nowell, Willis E. Nowell and Frederick D. Nowell; that in carrying on and prosecuting said litigation and in particular the said suit No. 519-A in the furtherance and promotion of their said plan of reorganization, the said [85] Corning, Gillespie and Fairchild were aided and abetted by the said Hackett and by the said Henry and William Endicott, their co-conspirators, whose consent and approval they had in so doing, and with whom the said Corning, Gillespie and Fairchild were acting in collusion and as the agents of said Hackett and said Endicotts in the form and style of said Reorganization Committee in the carrying on and prosecution of said litigation; that as the first step in this said course of litigation which was carried on and prosecuted in the furtherance and promotion of said plan of reorganization of the said Berner's Bay Mining and Milling Company, and specifically and in particular for the purpose of coercing and compelling the said Nowells into joining said plan of reorganization, the said defendants procured or per-

mitted the said Reorganization Committee as their agents or representatives to file a Petition for Resignation of Receiver in said cause numbered 603 on the docket of this court on or about the eleventh (11th) day of December, 1905, wherein among other things it was alleged as follows:

“That on and prior to the 24th day of June, A. D. 1896, the said Thomas S. Nowell and Willis E. Nowell, claiming to be jointly interested therein, acquired title to these certain lode mining claims included in what is known as the ‘Johnson Group,’ and hereinbefore referred to, known and described as the ‘Northern Light,’ ‘Northern Light Extension No. 1,’ and ‘Northern Light Extension No. 2,’ which are adjacent to the properties of the defendant companies, and which were acquired by the said Thomas S. Nowell and Willis E. Nowell while they were officers of the defendant corporations and entrusted with the proper development, care, custody, and management of the properties of the defendant companies; and that the said lode mining claims last above mentioned are appurtenant to and properly and practically workable only by means of the workings in the mining claims and property of the defendant corporations. [86]

That prior to the said 24th day of June, A. D. 1896, the said Thomas S. Nowell caused a notice of stockholders’ meeting of the Berner’s Bay Mining and Milling Company to be given, wherein and whereby it was proposed to sell to the said Berner’s Bay Mining and Milling Company, among other claims, the said Northern Light, Northern Light No. 1 and

Northern Light No. 2 lode claims, and that in the same notice of meeting of stockholders aforesaid it was proposed to increase the capital stock of the said Berner's Bay Mining and Milling Company from one million (1,000,000) to two million five hundred thousand (2,500,000) dollars, with the intention and purpose stated by the said Thomas S. Nowell of selling all of the mining claims mentioned in the said notice to the Berner's Bay Mining and Milling Company for the amount of such increase of capital stock, to wit: the sum of \$1,500,000.

That the said notice of meetings was signed by the said Thomas S. Nowell as president, and by Arthur L. Nowell as assistant secretary or 'clerk,' and that thereafter, and pursuant to the said notice a meeting of the stockholders of the Berner's Bay Mining and Milling Company was held at No. 30 Exchange Street, in the city of Portland, State of Maine, at which said meeting it was voted to increase the capital stock of the said Berner's Bay Mining and Milling Company from one million to two million five hundred thousand dollars, and all of the proposed increase of capital stock, to wit, \$1,500,000.00, was voted to be delivered to the said Thomas S. Nowell and Willis E. Nowell, to wit, \$500,000.00 of the said increase of capital stock to Thomas S. Nowell, and \$1,000,000.00 of the said capital stock to Willis E. Nowell, it being provided that the said Willis E. Nowell should assign the said \$1,000,000.00 of capital stock to George M. Nowell as trustee, and it being [87] further proposed that the said Willis E. Nowell, his administrators and assigns should have an irrevoca-

ble power of attorney to vote such capital stock during the existence of such trust; that a copy of the trust agreement under which the said \$1,000,000.00 of the capital stock of said Berner's Bay Mining and Milling Company so issued to the said George M. Nowell as trustee for the said Willis E. Nowell was to be handled and disposed of is hereto annexed and marked Exhibit 'B' and made a part hereof.

And your petitioners allege that subsequently, and from time to time, the said last-mentioned capital stock was represented by the said Willis E. Nowell at the meeting of the Berner's Bay Mining and Milling Company and by him used and voted.

And your petitioners are informed and believe, and so allege the fact to be, that the true intent and meaning of the said last-mentioned proceedings was to sell to the said Berner's Bay Mining and Milling Company, in connection with other claims, the said Northern Light, Northern Light No. 1, and Northern Light No. 2 lode mining claims constituting the 'Johnson Group'; and your petitioners further allege that the said three claims constitute the principal value of the said claims so offered for sale pursuant to the aforesaid notice of meeting; and your petitioners are informed and believe and so allege the fact to be that subsequently, and by the insertion of an offer of sale recorded in the minutes of the said meeting of stockholders of the words 'last twelve' the true intent and meaning of the said transaction was wrongful and fraudulently changed and altered, and that thereafter and pursuant to a scheme on the part of the said Thomas S. Nowell and the said Willis E. Nowell to

defraud the said Berner's Bay Mining and Milling Company and its creditors, the said Thomas S. Nowell and Willis E. [88] Nowell failed, neglected and refused to convey the said three mining claims, to wit, the Northern Light, Northern Light Extension No. 1, and Northern Light Extension No. 2 lode claims to the said company, and your petitioners are informed and believe, and allege the fact to be, that from the date of the said meeting of stockholders, and ever since said time, the said Thomas S. Nowell and Willis E. Nowell, and the Nowell Mining and Milling Company have held the title in and to the said three lode mining claims above described, in trust for the use and benefit of the said Berner's Bay Mining and Milling Company, its stockholders and creditors and the creditors of the receiver herein, having received and retained the purchase price thereof."

And praying among other things, that the said F. D. Nowell might be removed as receiver and some other person appointed in his place and stead with instructions to sue these plaintiffs for a conveyance to the said Berner's Bay Mining and Milling Company or the receiver thereof, of the said "Johnson Group" of claims.

XIX.

That thereafter such proceedings were had upon said petition that said W. B. Hoggatt was on the third day of January, 1906, by the said Court appointed coreceiver with the said F. D. Nowell of the said Berner's Bay Mining and Milling Company for the express purpose of bringing such suit, and the order of Court provided that the said W. B. Hoggatt

should superintend such litigation in the name of the receivers as may from time to time be directed to be instituted by the Court or Judge.

XX.

These plaintiffs further allege and show to the Court that the said W. B. Hoggatt knew absolutely nothing about the facts alleged in said Petition for Resignation of Receiver and had absolutely no personal knowledge concerning the matters subsequently set forth in the Bill of Complaint hereinbefore set out, but the said W. B. Hoggatt [89] employed the same counsel, Messrs. Shackelford and Lyons, that had theretofore represented the said Reorganization Committee and their co-conspirators, and permitted them to bring said suit in the name of the said receivers, but the entire management, control, and purpose of said suit was left by the said Hoggatt entirely to the said Reorganization Committee and their co-conspirators and their counsel.

Plaintiffs further allege and show that while at said time the said Reorganization Committee and their co-conspirators at the time they brought or caused said suit No. 519-A on the docket of this court to be brought against these plaintiffs had expectations or hopes of deceiving the said Court into making a favorable decree in said suit for the conveyance to the said Berner's Bay Mining and Milling Company of the said "Johnson Group" of mines, their main purposes and objects at said time were first to delay a receiver's sale for cash of the properties of said Berner's Bay Mining and Milling Company and postpone the settlement of the receivership

of the said properties, for the obvious reason and fact that their said plan or reorganization did not provide for a sufficiently large amount of new capital with which to purchase said properties at a receiver's sale for cash, and second by taking advantage of the financial distress in which Thomas S. Nowell at the time found himself, due to the failure of his plans to sell the properties of the said Berner's Bay Mining and Milling Company for cash or reorganize the said company and put it on a large producing and dividend paying basis, to put these plaintiffs to such trouble and great expense in defending their reputations and property rights in the litigation which the said Reorganization Committee and their co-conspirators intended to bring and have brought against the said plaintiffs herein as to coerce and compel these said plaintiffs, out of sheer pecuniary inability to pay the cost of protecting themselves in the courts, into yielding and submitting to the demands of the said Reorganization Committee and their co-conspirators; and the said John C. McBride, receiver, who was substituted in [90] the place of said W. B. Hoggatt and F. D. Nowell, as well as his predecessors in office, have had nothing whatever to do with the management of said suit No. 519-A, other than to lend their names thereto, but said litigation has at all times been conducted, managed, and counsel therein employed for the said receiver, by the said Corning, Gillespie, and Fairchild and Henry and William Endicott and their co-conspirators.

XXI.

These plaintiffs further allege and show and aver

the truth to be that some time prior to the filing in said cause No. 603 by the said Corning, Gillespie and Fairchild of the said Petition for Resignation of Receiver as hereinbefore alleged and in part set out, the said Wallace Hackett on October 30th, 1905, wrongfully and fraudulently, and without having any authority so to do, obtained possession of the books, writings, documents and files of the said Berner's Bay Mining and Milling Company by removing and carrying away the same from the Metropolitan Storage Warehouse situated in Cambridge, Massachusetts, and at the same time having access to the private and personal books, writings, documents and files of the said Thomas S. Nowell, by reason of the fact that the said private and personal books, writings, documents and files of the said Thomas S. Nowell were stored at the said storage warehouse in the same room with the said books, writings, documents and files of the said company, the said Wallace Hackett, without any permission or authority from or knowledge or consent of the said Thomas S. Nowell wrongfully and fraudulently and with the intent wrongfully and fraudulently to deprive the said Thomas S. Nowell, the rightful owner of the same, removed and carried away certain letter-press copy-books which said letter-press copy-books belong to and are the exclusive and absolute personal property of the said Thomas S. Nowell; and these plaintiffs further allege and show the Court and aver the truth to be that the records of the said Metropolitan Storage Warehouse Company show that the said Wallace Hackett gave his receipt [91] on Octo-

ber 30th, 1905, to the said Metropolitan Storage Warehouse Company, which said receipt recites that the said Hackett had removed from the said storage warehouse the "Books and maps the property of Berner's Bay Mining and Milling Co. and Nowell Mining Co.," but the records of the said Metropolitan Storage Warehouse Company nowhere show that the said Hackett had removed any of the private and personal books, writings, documents and files of the said Thomas S. Nowell; that these plaintiffs until about April, 1907, did not discover the fact that the said Wallace Hackett had, on October 30th, 1905, removed from said storage warehouse any of the private and personal books, writings, documents and files of the said Thomas S. Nowell; that between April, 1907, and September, 1910, these plaintiffs believed that the said Hackett had removed from the said storage warehouse no more than two certain letter-press copy-books marked "R" and "S" and belonging to the said Thomas S. Nowell; that on June 20th, 1910, this Court (Judge Cushman) made an order in the above-entitled cause requiring the above-named defendants to deposit with Charles K. Darling, Esquire, Clerk of the United States Circuit Court for the District of Massachusetts, the said books, papers and files of the said Berner's Bay Mining and Milling Company and the two said letter-press copy-books marked "R" and "S"; that in pursuance to said order of Court made on June 20th, 1910, the defendants C. R. Corning and Wallace Hackett, deposited on or about September 1st, 1910, sundry books and papers of the said Berner's Bay

Mining and Milling Company, and six (6) letter-press copy-books, three (3) cash-books and several account-books of Notes Payable and Receivable belonging to and the personal property of the said Thomas S. Nowell; that the said Hackett and Corning and their codefendants and co-conspirators did not obey the said order of Court but in disobedience of its terms the said Hackett and Corning and their codefendants continued to conceal and suppress three other and different letter-press copy-books belonging to the said Thomas S. Nowell and which had also been removed by [92] the said Hackett from the said storage warehouse; and the said Hackett and Corning did not produce these said three other and additional letter-press copy-books until some time after these plaintiffs had discovered that they had not been produced and until after these plaintiffs had filed in this court a motion for an order of Court for their production; and these plaintiffs further allege and show the Court and aver the truth to be that these said three other and additional letter-press copy-books are the very ones that contain the material and identical evidence upon which these plaintiffs in the first instance based their allegations of a fraudulent conspiracy in the above-entitled cause, No. 717-A on the docket of this court; that up to the time the said Corning and Hackett deposited the said books and papers with the said Darling as aforesaid these plaintiffs had no knowledge whatsoever or any means of knowledge of the fact that the said Hackett had removed from the said storage warehouse any other books of any kind belonging to the said Thomas

S. Nowell than the above-named two letter-press copy-books marked "R" and "S"; that from the thirtieth day of October, 1905, until about the first day of September, 1910, the said Hackett has at all times wrongfully and fraudulently concealed and withheld from the said Thomas S. Nowell, the president and largest individual stockholder of the said Berner's Bay Mining and Milling Company, all knowledge of the whereabouts of the said books and papers of the said company and contrary to his duty as a director of the said company, the said Hackett, in aiding and abetting the said Reorganization Committee and their co-conspirators in their conspiracy to cheat and defraud these plaintiffs out of their rightful title to the said "Johnson Group," has done everything within his power to prevent the said Thomas S. Nowell from inspecting or having any access whatsoever to the said books and papers of the said Berner's Bay Mining and Milling Company; that the said Hackett, in the furtherance and promotion of this said scheme and conspiracy to cheat and defraud these plaintiffs as aforesaid, has concealed from these plaintiffs [93] all knowledge of the fact that he had removed from the said storage warehouse these said nine letter-press copy-books, cash-books, and account-books of Notes Payable and Receivable belonging to the said Thomas S. Nowell; that the said Hackett wilfully and fraudulently failed to disclose that fact by deceiving the agents of the said storage warehouse company into believing that he was at the time removing from the said storage warehouse books and papers belonging to the

said Berner's Bay Mining and Milling Company and the Nowell Mining Company only and when demand in 1908 was made upon the said Hackett by the duly authorized attorney and agent of the said Thomas S. Nowell for delivery of said two letter-press copy-books marked "R" and "S" the said Hackett, although it has subsequently appeared that he removed at least nine (9) letter-press copy-books from the said storage warehouse, denied all recollection of having removed any letter-press copy-books from the said storage warehouse, and although it has subsequently appeared that the said Hackett removed other private and personal account-books from said storage warehouse, he also denied having removed from the said storage warehouse any of the personal books of the said Thomas S. Nowell; that the inspection of these books and papers and nine letter-press copy-books that was permitted these plaintiffs in pursuance of the above-named order of Court made on the twentieth (20th) day of June, 1910, has disclosed to these plaintiffs the fact that, from the said books and papers and the said nine letter-press copy-books so obtained by the said Hackett, he and his co-conspirators, these defendants, either learned or had the means of learning the following facts or of refreshing their memories concerning facts which they had previously known in regard to the title of the said "Johnson Group" of mines and in regard to the transaction of June, 1896, and subsequently thereto that were had by and between the said Thomas S. Nowell and those associated with him in the said Berner's Bay Mining and Milling Company,

which said principal facts, briefly stated are as follows, to wit:

That in the month of November, 1895, the plaintiffs, Thomas S. Nowell [94] and Willis E. Nowell, obtained an option to purchase said "Johnson Group" from the then owners thereof for an agreed consideration of Twenty-five thousand dollars (\$25,000) of cash, and that a deed was placed in escrow pursuant to said option, which deed, upon delivery, would convey the title thereto to the plaintiff, Willis E. Nowell; that said option had not been taken up and the purchase price for said "Johnson Group" not paid and the deed not delivered in the month of June, 1896; that in the said month of June, 1896, there had been certain negotiations between the said Thomas S. Nowell and some of the directors of the Berner's Bay Mining and Milling Company, in which it was contemplated that the said Nowells should transfer their said option to purchase said "Johnson Group" to the Berner's Bay Mining and Milling Company, together with twelve other certain mining claims pursuant to a contemplated plan of recapitalization involving an increase in the capital stock and mortgage bond indebtedness of the said company; that it was proposed for said company to take up said option and secure an absolute transfer of the said "Johnson Group" to the said Berner's Bay Mining and Milling Company by giving to the then owners of said "Johnson Group" the promissory note of the said Thomas S. Nowell for the purchase price of twenty-five thousand dollars (\$25,000) secured by mortgage bonds of the company as col-

lateral security, if that arrangement could be made with the then owners; that the arrangement for the delivery of the said promissory note of Thomas S. Nowell and of the said mortgage bonds in payment or as security for payment of the said purchase price had not been accepted by the then owners of the "Johnson Group"; and said Hackett and his co-conspirators further learned that the said contemplated arrangement whereby said option was to be transferred to the said Berner's Bay Mining and Milling Company had for the prudential reason that the company could not pay for the same, been abandoned by the said Thomas S. Nowell, president and chief executive officer of said Berner's Bay Mining and Milling Company and by the directors of the said company, prior to the proposed [95] stockholders' meeting to be held on June 24, 1896; said Hackett and his co-conspirators further learned that with a view of carrying out the contemplated recapitalization of the said Berner's Bay Mining and Milling Company aforesaid a call or notice of stockholders' meeting had been prepared and signed by Thomas S. Nowell as president and director and by four other directors of the said company, but that said call or notice had never been issued to the stockholders of the said company, for the reason that it was discovered to be defective, as it did not contain the names of all the mining lode claims that it was intended, at the time the said defective call was prepared, should be offered to and accepted by the stockholders of the said company at their meeting to be held on June 24, 1896; that this said unused

and defective call or notice to the said stockholders' meeting of June 24, 1896, as originally prepared and signed by the president and four other directors of the said company as aforesaid had been left amongst the files of the said Berner's Bay Mining and Milling Company, which said call or notice so prepared and abandoned is the one set out in the XIII (13th) finding of fact made by the Court in said cause numbered 519-A on the docket of this court; said Hackett and his co-conspirators further learned that another and new and different call or notice to the said stockholders' meeting of June 24, 1896, had been prepared and signed by the said Thomas S. Nowell as president and director and by all the other six directors of the said company and issued to the stockholders of the said company in lieu and in place and stead of the other and first and abandoned call or notice, which said second call or notice so prepared and signed by the president and all of the directors of the said company is the one set out in the records of the said Berner's Bay Mining and Milling Company and marked "Plaintiffs' Exhibit F" in said cause No. 519-A; that this said original call signed by all the directors of the said company was left amongst the files of the said Berner's Bay Mining and Milling Company and was there found by the said Hackett and his co-conspirators; [96] said Hackett and his co-conspirators further learned that at the meeting of the stockholders of June 24, 1896, of the said Berner's Bay Mining and Milling Company the said Thomas S. Nowell in behalf of himself and Willis E. Nowell, offered to the said Berner's Bay Mining and

Milling Company to transfer to it twelve (12) certain mining claims, being the last twelve mining claims named in the call that was actually issued for the meeting and which offer expressly excluded the said "Johnson Group," and that the stockholders of the said company accepted this offer of the said twelve (12) mining claims and agreed to give therefor one million dollars (\$1,000,000) par value of "deferred" common stock; said Hackett and his co-conspirators further learned that prior to the abandonment of said intention to offer or include the said "Johnson Group," said offer had been prepared so as to include the said twelve claims actually offered as well as the said "Johnson Group," but that upon the abandonment of the intention to offer the said Johnson Group as aforesaid, said offer as originally prepared had been changed and amended prior to its being submitted to the stockholders at said stockholders' meeting on June 24, 1896, by the interlineation of the words "last twelve," thereby expressly excluding an offer to the said company of the said "Johnson Group," and the said writing so changed and interlined was found by said Hackett and his co-conspirators amongst the writings, documents and files of the said Berner's Bay Mining and Milling Company; said Hackett and his co-conspirators also became aware of the fact that a meeting of the directors of the said company was called for June 30, 1896, by the said Thomas S. Nowell, the president of the said company, and the said Hackett and his co-conspirators became aware of or had knowledge of the fact that this said directors' meeting was called

by the said Thomas S. Nowell for the express purpose of submitting or causing to be submitted to the directors of the said company the records of the transactions of the stockholders of the said company had at their said meeting held on [97] June 24, 1896; said Hackett and his co-conspirators further learned that the said Thomas S. Nowell, president of the said company, with the intent and for the purpose of securing the presence of each and every director of the said company at the said directors' meeting of June 30, 1896, wrote a personal letter to each and every director of the said company (except Albert C. Howard who as treasurer of the said company had his office with the president), making a personal and specific request to each of the directors to be present at said directors' meeting of June 30, 1896; that the letters addressed to the directors who resided outside of Boston, Massachusetts, Hackett, Fairchild and Plummer were particularly pressing upon each of the said three nonresident directors for their presence at such an important meeting; said Hackett and his co-conspirators further learned that the said Thomas S. Nowell was always in close touch with the directors of the said company and with his associate stockholders and financial backers, and that the said Thomas S. Nowell always consulted with the said directors and said stockholders and financial backers concerning the management of the affairs of said company, and that it was the expressed desire and intent of the said Thomas S. Nowell that the directors of the said company should "direct" its affairs and govern its policy; the said Hackett and

his co-conspirators further learned or had knowledge of the fact that the directors of the said company at their said meeting of June 30, 1896, "approved and adopted" and "ratified and confirmed" the action of the stockholders of the said company at their meeting of June 24, 1896, in accepting the offer of twelve claims only; said Hackett and his co-conspirators further learned that although the stockholders of the said Berner's Bay Mining and Milling Company had accepted, at their meeting of June 24, 1896, an offer of the last twelve mining claims named in the recorded and true call to said meeting, and that although the proposed recapitalization of the said company had been carried out after the [98] acceptance of the offer of the said twelve (12) mining claims, the said Thomas S. Nowell was still desirous of securing a conveyance of the said "Johnson Group" to the said company, and that during a period of several months subsequently to June, 1896, the said Thomas S. Nowell was making continued efforts to effect some arrangement with the then owners of the said "Johnson Group" which should result and was intended to result in a conveyance of the same to the said company; said Hackett and his co-conspirators further learned or became aware of the fact that the financial condition or pecuniary resources of the said company in June, 1896, and at all times subsequently thereto were so depleted that it was entirely impossible for the said company to raise or secure the said purchase price of twenty-five thousand dollars (\$25,000) for the said "Johnson Group" except by a pledge of its mortgage bonds

as collateral security upon the personal note of the said Thomas S. Nowell; that the indebtedness of the said company and of the said Thomas S. Nowell to the Tremont National Bank of Boston, Massachusetts, and to the associates of the said Thomas S. Nowell was so large that the said purchase price of twenty-five thousand dollars (\$25,000) could not be provided by the said associates of the said Thomas S. Nowell; said Hackett and his co-conspirators further learned that the said Thomas S. Nowell did not cease his efforts to secure a conveyance of the "Johnson Group" to the said company by a pledge of its mortgage bonds as security for the payment of the said purchase price therefor, until it was found impossible so to do, whereupon it was found necessary that the said Nowells should pay out of their own resources the said purchase price of twenty-five thousand dollars (\$25,000) and take title to the said "Johnson Group" themselves; said Hackett and his co-conspirators further learned or had knowledge of the fact that the large indebtedness of the said Berner's Bay Mining and Milling Company and of the said [99] Thomas S. Nowell to the said Tremont National Bank and the said associates of Thomas S. Nowell rendered it of paramount importance that the said company and Thomas S. Nowell should not become insolvent and fail, but that the proposed recapitalization of the said company should be carried out and become effective without regard to any proposed conveyance of the said "Johnson Group" to the said company; and Hackett and his co-conspirators also knew or became aware

of the fact that the said recapitalization in June, 1896, of the said Berner's Bay Mining and Milling Company was not carried out in consideration of or even induced by any promise or agreement of the said Thomas S. Nowell to convey or cause to be conveyed the said "Johnson Group" to the said company, but that the real objects that were desired to be accomplished by the associates and creditors of the said company and Thomas S. Nowell were the prevention of the insolvency and bankruptcy of the said company and Thomas S. Nowell, the raising of fresh capital by the sale of the new bonds, and the possible avoidance by the said associates and creditors of the said company and of Thomas S. Nowell of the payment of the debts of the said company and of said Thomas S. Nowell; and the said Hackett, Endicotts and their co-conspirators further learned or had knowledge of the facts that the said "Johnson Group" had never been offered to or accepted by the said Berner's Bay Mining and Milling Company, that the records of the said stockholders' meeting of June 24, 1896, were a true and full account of the transactions of the stockholders of the said company at said meeting, that the said records had never been changed or altered in any way for any purpose whatsoever, fraudulent or otherwise, that a contract to sell the said "Johnson Group" to the said company had never been entered into by and between the said company and Thomas S. Nowell and Willis E. Nowell; and the said Hackett, Endicotts and Fairchild and their co-conspirators further knew that in the year 1897 they had participated as stock-

holders of the said Berner's Bay Mining and Milling Company [100] in a division of the properties of the said company into three parts and had voted to transfer the same to three other companies, to wit, the Northern Belle, Seward and Ophir Gold Mining Companies, which said division expressly excluded the said "Johnson Group"; that in the year 1899 the said Hackett and Endicotts sent their proxies to the meetings of the stockholders of the three above-named companies held on May 9, 1899, and voted with the other stockholders to grant a certain right of way through the tunnel of said companies to the said Thomas S. Nowell and Willis E. Nowell or Nowell Mining and Milling Company as the "owners" of the said "Johnson Group"; that in the years 1900 and 1901 the said Hackett and William and Henry Endicott in carrying on negotiations with a certain New England Exploration Company for a sale to it of the properties of the said Berner's Bay Mining and Milling Company repeatedly and expressly recognized in writing the title of the Nowells to the said "Johnson Group" and treated with the said Thomas S. Nowell as being the absolute and exclusive owner of the legal and beneficial title of the said "Johnson Group" (See Exhibit "A" attached to this Bill of Complaint); that the said Hackett and William and Henry Endicott in 1902 became parties to a certain Mines Securities Corporation contract which said contract further recognized the absolute and exclusive title of the said Nowells to the said "Johnson Group" (See Exhibit "B" attached to this Bill of Complaint); that the said

Hackett and William and Henry Endicott in the year 1903 entered into another contract dated February 26, 1903, with the said Thomas S., Willis E., and Frederick D. Nowell, which said contract further expressly recognized and dealt with the legal and beneficial title to the said "Johnson Group" as being the absolute and exclusive property of the said Nowells (See Exhibit "C" attached to this Bill of Complaint); that the said Endicotts and Hackett in the year 1904 entered into further contractual relations with the said Nowells wherein the absolute and exclusive title of the said Nowells [101] to the said "Johnson Group" was again expressly recognized and conceded; that in the year 1905 the said Hackett and Endicotts became parties to and depositors under the plan of reorganization of the said Berner's Bay Mining and Milling Company of the said Corning, Gillespie and Fairchild, which reorganization plan expressly provided for the purchase from the said Nowells of the "unencumbered title to the Johnson mines"; that the said Hackett and Endicotts acquiesced in this said provision to purchase the said "unencumbered title" to the said "Johnson Group" and the said Endicotts offered the said Thomas S. Nowell substantial pecuniary inducements to accept the said two hundred and fifty thousand dollars (\$250,000) par value of common stock in payment for the title to the said "Johnson Group" (See Exhibit "D" attached to this Bill of Complaint); that subsequently to June, 1896, the said Hackett and William and Henry Endicott purchased or acquired a large majority of the mortgage

bonds of the said Berner's Bay Mining and Milling Company, well knowing and having full and actual knowledge of the fact that the said "Johnson Group" did not belong to the said company but was owned and claimed by the said Nowells as their rightful and exclusive property; that between the years 1898 and 1902 the said William and Henry Endicott purchased upwards of sixty thousand dollars (\$60,000) of the receiver's certificates issued by the said receiver, Frederick D. Nowell, and during all these times the said Endicotts well knew that the said "Johnson Group" had not been taken into possession by the said receiver; that between the years 1897 and 1900 the said William and Henry Endicott advanced upwards of four hundred thousand dollars (\$400,000) to the said Thomas S. Nowell for the benefit and use of the said Berner's Bay Mining and Milling Company without making any effort to compel the said Thomas S. Nowell to convey or even stipulating that he should convey the said "Johnson Group" to the said [102] company; that between the years 1896 and 1906 the said Hackett and William and Henry Endicott have done many other acts showing their absolute and unqualified recognition of the absolute and exclusive legal and beneficial title of the said Nowells to the said "Johnson Group"; that between the years 1896 and 1906 the said Hackett and William and Henry Endicott have co-operated with the said Thomas S. Nowell in many efforts to effect a sale of the properties of the said Berner's Bay Mining and Milling Company, in all of which proposed contracts or arrangements the

absolute and exclusive legal and beneficial title of the said Nowells to the said "Johnson Group" has been recognized and conceded by all parties in interest; that the said Thomas S. Nowell was the unsecured creditor of the said Berner's Bay Mining and Milling Company to the amount of three or four hundred thousand dollars; that at the time the said Hackett and Endicotts became depositors under the said reorganization plan of the defendants, Corning, Gillespie and Fairchild, the said Hackett and Endicotts had given up all hope that the said Thomas S. Nowell would ever be able to consummate a sale of the properties of the said company, or a reorganization of the same; said Hackett and his co-conspirators became also aware of the fact that the only living person among these plaintiffs or associated with or friendly to them who had ever known the details of said transaction so as to be able to give the facts to plaintiff's counsel and point out the sources from which the evidence thereof could be obtained, was the plaintiff Thomas S. Nowell; said Hackett and his co-conspirators also became aware of the fact that Arthur L. Nowell, deceased, a son of Thomas S. Nowell, who had been employed by the said Thomas S. Nowell as his private secretary and confidential clerk, who had been assistant treasurer and assistant clerk of the said Berner's Bay Mining and Milling Company and to whom the said Thomas S. Nowell had entrusted all the details of the corporate affairs of [103] the said company and of his personal business affairs, was the only other person who had been associated with or friendly to these plaintiffs

who had ever had personal knowledge of the details of said transactions of June, 1896; said Hackett and his co-conspirators further knew or learned that the said Arthur L. Nowell had died in January, in the year 1904, two years before said suit No. 519-A was brought against these plaintiffs; said Hackett and his co-conspirators were further aware of the fact that the said Willis E. Nowell, one of the defendants in said suit No. 519-A, was not in Boston, Massachusetts, in June, 1896, but was on the Pacific Coast, and had not taken any part whatsoever in the said transactions of June, 1896, and that the said Willis E. Nowell had no knowledge whatsoever of the negotiations or details of the said transactions of June, 1896, and said Hackett and his co-conspirators well knew that Willis E. Nowell was not present at said stockholders' meeting of June, 1896, and that he took no part in and had nothing at all to do with the vote of the stockholders at said meeting; that he had nothing to do with the making up, formulating, or engrossing of the records and minutes of said meeting or of any of the records of the said company, and that he was absolutely innocent of any and all intent or desire to defraud the said Berner's Bay Mining and Milling Company out of a farthing; and said Hackett and his co-conspirators were further aware of the fact that all the writings, documents, and files of said company and of Thomas S. Nowell that pertained to said transactions and which could or would throw light upon a transaction so long past were in their possession and under their absolute control; said Hackett and his co-conspirators were

further aware of the fact that the said Thomas S. Nowell was a very old man, seventy-four years of age; that his memory regarding transactions that had transpired some ten years before was almost a blank until he might be able to refresh his [104] recollection by an examination of papers and documents relating to such transactions; and said Hackett and his co-conspirators were further aware of the fact that all the papers and writings or copies thereof that, prior to October, 1905, had been in the possession of said Thomas S. Nowell through and by means of which he could so refresh his recollection, had without the knowledge or consent or the authority given by said Thomas S. Nowell, been wrongfully and surreptitiously removed by said Hackett from the possession of said Thomas S. Nowell, and that by the wrongful withholding, concealment and suppression of the same they would be enabled to prevent the said Thomas S. Nowell from refreshing his memory and thereby prevent him from making an adequate, complete and meritorious defense against the unfounded, fictitious and fraudulent acts with which, it was intended by said Hackett and his co-conspirators, he should be charged, and by reason of such knowledge said Hackett and his co-conspirators conceived and believed that they would be able to perpetrate the fraud contemplated with success and commit the perjury contemplated without discovery.

These plaintiffs further allege and show the Court, and aver the truth to be that said Hackett, Endicotts and their co-conspirators, these defendants, in the

light of all these facts hereinbefore set out, after ten years of acquiescent conduct and of mutual trust and co-operation, and at a time when they believed that the efforts of the said Thomas S. Nowell could be of no further service or value to them, well knowing that the said Thomas S. and Willis E. Nowell were entirely innocent of any wrongdoing and having full and complete knowledge of the fraudulent and fictitious character of the suit they were about to bring against the said Nowells, these defendants, thereupon determined by the commission of perjury in regard to said documents and by the concealment and suppression of the actual and real call for the stockholders' meeting of June [105] 24, 1896, and of the said letter-press copy-books and of the other evidence which was then in their wrongful possession as aforesaid, and by the production of false evidence in court, so to deceive the said United States District Court in Juneau, Alaska, as to induce it to believe and to find that the said Thomas S. Nowell and Willis E. Nowell had actually offered at said stockholders' meeting of June 24, 1896, to sell to the said Berner's Bay Mining and Milling Company the said "Johnson Group" of mining claims, and that the said company had accepted said offer and that the said Thomas S. Nowell and Willis E. Nowell had thereafter fraudulently altered and changed the records of said company so as to conceal the true intent and meaning of said transaction and defraud the said Berner's Bay Mining and Milling Company out of the title to said "Johnson Group" of mining claims.

XXII.

Plaintiffs further allege and show the Court and aver the truth to be that after having conspired and confederated as aforesaid and after having learned and had knowledge of the facts hereinbefore set out, the said Corning, Gillespie, and Fairchild, Hackett and the two Endicotts procured to be brought the said action hereinbefore mentioned, numbered 519-A on the docket of the United States District Court for Alaska, Division Number One at Juneau, and pursuant to said conspiracy to defraud these plaintiffs out of their title to the said "Johnson Group," the Bill of Complaint in said cause was prepared, which said Bill of Complaint is hereinbefore set out; and in the light of their *present knowledge of said conspiracy* to cheat and defraud these plaintiffs as above alleged, these plaintiffs further allege and show the Court and aver the truth to be that the pleadings in said Bill of Complaint charging [106] and alleging the act of a wrongful and fraudulent altering and changing of the corporate records of the said Berner's Bay Mining and Milling Company were so vague, veiled and misleading in their phraseology as to give to these plaintiffs no notice whatsoever of the actual state of facts that they would be obliged to meet as defendants in said cause No. 519-A, and in consequence of the said vague, veiled and misleading character of said pleadings in said Bill of Complaint, these plaintiffs were actually without notice of and were completely misled concerning the case or state of facts which they thought and believed they would be obliged to meet in said cause No. 519-A; that the gravamen of the com-

plaint in said cause No. 519-A consisted of the allegation, upon information and belief that “after the date of said stockholders’ meeting, and after said sale of said fifteen mining claims to said corporation, as aforesaid, by the insertion in an offer of sale recorded in the minutes of the said stockholders’ meeting of the words ‘last twelve,’ the true intent and meaning of said transaction was wrongfully and fraudulently changed and altered”; that at the time these defendants and their counsel formulated and framed this latently ambiguous, veiled and misleading allegation they had in their possession the interlined offer upon which they based their fictitious theory of fraud in said cause No. 519-A, and they well knew that by concealing from the said Thomas S. Nowell the other evidence which they then had in their possession as hereinbefore alleged that the foregoing allegation of an insertion in an offer of sale concerning the existence of which the said Thomas S. Nowell owing to his extreme old age and the lapse of nearly ten years could have no possible memory or recollection, could give no notice to the said Thomas S. Nowell of the state of facts he would be obliged to meet or the state of facts which the Court it was intended by these defendants should be deceived into believing to be true; that these defendants and their [107] counsel for them so formulated and framed this said latently ambiguous, veiled and misleading allegation so as to make it appear on its face as if it were intended to allege that the *records themselves* had been wrongfully and fraudulently changed and altered; that the plaintiffs herein, at the time said cause No. 519-A

was instituted against them, were in utter ignorance and darkness as to the fraudulent and deceptive concealments to which these defendants were resorting and the ambiguous and misleading pleadings which these defendants were concocting and inventing for the purpose of keeping these plaintiffs uninformed as to what they should do to defend themselves in said cause No. 519-A; that these plaintiffs *were deceived and misled* concerning the true inwardness of this said conspiracy to cheat and defraud them; that the said latently ambiguous, veiled and misleading pleadings did actually deceive and mislead them; that the full and true conception and knowledge of this said deliberately plotted and ingeniously contrived scheme and conspiracy to injure and cheat and defraud these plaintiffs have been made possible to these plaintiffs only within the past four months by means of the inspection of the said books and papers which the said Wallace Hackett and his co-conspirators have wrongfully carried away and concealed since the thirtieth day of October, 1905, and these plaintiffs further allege and show the Court and aver the truth to be that the said Bill of Complaint was thus formulated, framed and phrased by these defendants and their counsel and agents in the way best suited to their purpose to mislead these plaintiffs and keep them uninformed and in ignorance of what they would have to do to defend themselves in said suit No. 519-A, and these plaintiffs further allege and show that the said misleading and keeping in ignorance of these plaintiffs by means of the said vague, veiled and misleading character of the [108] said

pleadings of the state of facts these plaintiffs would be obliged to meet as defendants in said Suit No. 519-A was done by the said Hackett and his co-conspirators and their agents with the intention so to mislead these plaintiffs and was done as a part of and pursuant to said scheme and conspiracy to cheat and defraud these plaintiffs out of their title to the said "Johnson Group" as hereinbefore alleged; and thereupon and pursuant to said conspiracy to cheat and defraud these plaintiffs the said Corning, Gillespie, and Fairchild, by their counsel and with the consent and approval of said Hackett and Endicotts, on March fifth, sixth and seventh, 1906, took the deposition of Thomas S. Nowell as their own witness and subjected him to a long direct examination, from which they learned that his memory regarding said transactions of June, 1896, was wholly defective and amounted to but little more than an entire absence of any knowledge whatever concerning the same; and these plaintiffs further allege and show that these said conspirators by their counsel conducted this said direct examination of Thomas S. Nowell in the way best suited to their purpose of discovering, not how much but how little, said Thomas S. Nowell was able to remember concerning said transactions of nearly ten years prior thereto and in conducting said direct examination they utterly failed to show or exhibit to the said Thomas S. Nowell any of the writings, papers, documents, letter-press copy-books or the interlined offer then in their possession and control which would have enabled said Thomas S. Nowell to refresh his memory, and with the premeditated in-

tent so to do said counsel thereby prevented the said Thomas S. Nowell from giving complete and adequate answers to the very questions to which he was repeatedly subjected, or from making any explanations whatsoever concerning the matters in issue; [109] and thereby intentionally prevented the said Thomas S. Nowell and absolutely precluded him from making the meritorious and adequate defence to the said charges of fraud which an inspection of the said books and papers would have enabled him to make, neither did said counsel do anything that was in any way calculated to lead to the discovery of the truth or merits of the case as they in truth and fact existed, but, on the contrary, they did everything within their power to prevent a disclosure to the Court of the truth and the merits of the case; and during the said direct examination of the said Thomas S. Nowell they further learned that owing to his age and physical and mental infirmities and the lapse of ten years the said Thomas S. Nowell could remember no more than that the corporate records of the said Berner's Bay Mining and Milling Company contained evidence of the said transactions of June, 1896, that he had absolutely no recollection of any other pertinent evidence than the said corporate records, that he had absolutely no recollection of the evidence of which the said Hackett and his co-conspirators had wrongfully and fraudulently possessed themselves as hereinbefore alleged and that the said Thomas S. Nowell would be unable to furnish his counsel in said cause with sufficient information to enable counsel to ascertain the source from which the evidence of the

real transaction as it in truth and in fact existed could be derived.

And these plaintiffs further allege and show that at the time said Bill of Complaint was prepared by counsel and verified by the said W. B. Hoggatt, one of the plaintiffs therein, the said W. B. Hoggatt had no knowledge whatsoever concerning the matters and things therein set out, and if he did believe the allegations therein contained to be true, as stated in his verification, such [110] belief was due entirely to false statements made to him by or on behalf of the said Hackett and his co-conspirators; that said Hackett and his co-conspirators and L. P. Shackelford, a member of the law firm of Shackelford and Lyons, of Juneau, Alaska, which said law firm prepared the said Bill of Complaint and Petition of Intervention in said cause No. 519-A, had absolute knowledge from the documents, writings, books, files and said nine letter-press copy-books then in their possession and which were being suppressed by them after having been wrongfully obtained as aforesaid, that the allegations contained in the 11th, 12th, 13th, 14th, and 15th paragraphs of the Bill of Complaint in said cause numbered 519-A which said paragraphs are here referred to without repeating the same, were absolutely false and untrue and they had reason to believe, and did believe, that the defendants in said action, by reason of the wrongful and fraudulent obtaining possession by the said Hackett of the books, documents and files of the said Berner's Bay Mining and Milling Company and of the said letter-press copy-books and other books belonging to the said

Thomas S. Nowell and the suppression and concealment of the same, the defendants in said cause No. 519-A (the plaintiffs herein) would be unable to adduce positive proof, or any proof at all other than mere verbal denials, of the falsity of said allegations of fraud.

XXIII.

Plaintiffs further allege and show that the said nine letter-press copy-books and other books which belong to and always have been and now still are the absolute and exclusive personal property of the said Thomas S. Nowell which in the year 1900 had been placed in storage by the said Arthur L. Nowell, the private secretary of Thomas S. Nowell, in the Metropolitan Storage Warehouse at Cambridge, Massachusetts, were, on the 30th day of October, 1905, wrongfully and without the knowledge or consent of said Thomas S. Nowell, taken [111] from said storage warehouse by said Wallace Hackett, and have been by said Hackett and his co-conspirators fraudulently and wrongfully withheld from the possession of said Thomas S. Nowell and all knowledge of their whereabouts concealed from him and his agents, who have sought to learn from said Hackett whence he had taken them and to whom he had delivered them; that the said Hackett delivered the said letter-press copy-books and other books into the possession of William Endicott and Henry Endicott, two of the defendants in this cause, and that from the possession of the said William and Henry Endicott said letter-press copy-books and other books were delivered into the possession of C. R. Corning, R. McM. Gillespie and S. W.

Fairchild, defendants in this cause, and were by the said Corning, Gillespie and Fairchild, as said Reorganization Committee of the said Berner's Bay Mining and Milling Company, or by one of them representing said Reorganization Committee, delivered into the possession of L. P. Shackelford, counsel for said Reorganization Committee, which said Reorganization Committee was acting as the agents of the said Wallace Hackett, William Endicott and Henry Endicott, and which said Reorganization Committee was prosecuting said cause No. 519-A on the docket of the United States District Court at Juneau, Alaska, with the consent and approval of the said Hackett, and William and Henry Endicott; that said Hackett has at all times refused to inform the said Thomas S. Nowell or his agents where the said letter-press copy-books and other books were to be found, and the said Thomas S. Nowell has been unable to discover where they were concealed and has not been able to recover possession of them, see them, or consult them until September 1st, 1910, wholly owing to the wrongful purloining and possession and fraudulent concealment of the same by said Hackett and his co-conspirators; that the said wrongful removal from the said storage [112] warehouse by the said Wallace Hackett took place more than two months before the service of the summons and complaint upon these plaintiffs in said cause No. 519-A; that the said letter-press copy-books contain copies of the private business correspondence of Thomas S. Nowell; that the said cash-books contain the accounts of the said Thomas S.

Nowell's private and family expenditures; and that said account-books of Notes Payable and Receivable contain the accounts and entries of the personal promissory notes which the said Thomas S. Nowell had made and delivered in his personal capacity to his associates and financial backers; that each and all of said books were purchased by Thomas S. Nowell out of his private funds, and that the salary of the stenographer to whom the original letters were dictated and by whom they were typewritten, the price of the typewriting machine and paper upon which they were written, the salary of the bookkeeper who kept the books of account, the office rent, and all other expenses pertaining to the making of the same were paid by said Thomas S. Nowell out of his private funds.

And these plaintiffs further allege and show the Court and aver the truth to be that said Hackett and his conspirators at the time said letter-press copy-books and other books were wrongfully removed by said Hackett from said storage warehouse as hereinbefore set out, had actual knowledge of the fact that said letter-press copy-book and other books were the personal and absolute property of said Thomas S. Nowell; that said letter-press copy-books contain the letter-press copies of letters written by said Thomas S. Nowell in June, 1896, and subsequently thereto, which said letter-press copies of said letters set forth the facts and circumstances surrounding the transactions of June, 1896, in such a clear and unmistakable manner as to show to these defendants and to give actual knowledge and notice to them of the following

facts, to wit: that the plan to offer the said “Johnson Group” to the stockholders of [113] the said Berner’s Bay Mining and Milling Company at their meeting of June 24, 1896, had been abandoned prior to said meeting for the prudential reason that the company could not pay for the same; that the last twelve claims named in the call to said meeting only had been offered to said company at said meeting; that the said “Johnson Group” had not been offered to the said company at said stockholders’ meeting; that the alleged contract of sale of the said “Johnson Group” had never been made and entered into by and between the said Thomas S. Nowell and Willis E. Nowell and the said Berner’s Bay Mining and Milling Company; that the corporate records had not been wrongfully and fraudulently changed and altered as alleged in said cause No. 519-A; and of the further fact that the allegations of fraud made by these defendants against these plaintiffs in the Bill of Complaint and Petition of Intervention in said cause No. 519-A, were absolutely false and without the slightest foundation in truth or fact, or in law or equity.

And these plaintiffs further allege and show and aver the truth to be that these said letter-press copy-books containing the letter-press copies of the letters written by Thomas S. Nowell in June, 1896, and subsequently thereto, were not only taken into possession as aforesaid by said Hackett and co-conspirators, but they, either all or some of them, were delivered over into the possession of Lewis P. Shackelford, a member of the said law firm of Shackelford & Lyons,

representing said Corning-Gillespie-Fairchild Reorganization Committee of the said Berner's Bay Mining and Milling Company, which said Reorganization Committee was acting as the duly authorized agents of these defendants in instituting and prosecuting said cause No. 519-A; that owing to his extreme age of 74 years and the lapse of ten years since the said transactions of [114] June, 1896, and owing to the further fact that the said Arthur L. Nowell, deceased, as private secretary and confidential clerk had had full charge of and had attended personally to all the details of his business, the said Thomas S. Nowell, was, at the time of the taking of his said deposition, almost completely unable to recall the circumstances surrounding the said transactions of June, 1896, in that he could remember no more than that the said "Johnson Group" had never been offered to the said Berner's Bay Mining and Milling Company, and could not remember the reason why the offer was so changed; and plaintiffs further allege and show and aver the truth to be that the said Thomas S. Nowell had entirely forgotten the existence of any and all evidence that was pertinent to or would or could throw light upon the circumstances surrounding said transactions of June, 1896, and for that reason he was also totally unable to assist his counsel in finding any evidence or to suggest to said counsel where such evidence might be found; that his counsel prior to, during, and for a long time subsequently to the trial and appeal of said cause No. 519-A had no knowledge whatsoever of any evidence being in existence, than that contained in the record of said cause, that had the

least bearing upon the issues raised in said cause No. 519-A; that prior to the trial, during the trial and at all times since the trial of said cause No. 519-A, the memory of Thomas S. Nowell has been so defective and so utterly lacking in all recollections of the said transactions of June, 1896, that he has not been able to be of the slightest assistance to counsel in the discovery of evidence pertinent to the issues of said cause No. 519-A; that during the month of January, 1909, said Thomas S. Nowell was stricken with a severe illness and a stroke of apoplexy was narrowly averted; that his general health [115] since said attack has been enfeebled and much impaired; that Arthur L. Nowell, the only other person than Thomas S. Nowell connected with these plaintiffs who had had any actual knowledge of said transactions of June, 1896, had died in January in the year 1904.

And these plaintiffs further allege and show the Court and aver the truth to be that an examination by the said Thomas S. Nowell of these said letter-press copy-books would have enabled him to recall the reason why the plan to offer the said "Johnson Group" to the said Berner's Bay Mining and Milling Company had been changed prior to the said stockholders' meeting of June 24, 1896, and why it was finally decided by the directors of the said company that the said Thomas S. Nowell should not include the said "Johnson Group" in said offer but should offer twelve mining claims only to the said company at said stockholders' meeting of June 24, 1896; that an examination of the original letters that had been copied into said letter-press copy books *has*

enabled the said Thomas S. Nowell to recall the said reason why the said Johnson Group was not offered to the said Berner's Bay Mining and Milling Company at said Stockholders' meeting held on June 24, 1896; that an examination of the original letters which had been copied into said letter-press copy-books, by enabling the said Thomas S. Nowell to recall the said reason, has enabled him to explain why the interlineations apparent upon its face were made in the said offer (Plaintiffs' Exhibit "D" in the said suit No. 519-A) of the "last twelve" mining claims named in the recorded call to said stockholders' meeting held on June 24, 1896; that therefore, had Thomas S. Nowell been permitted in March, 1906, to examine said letter-press copy-books he would have been thereby enabled to recall said reasons and make a meritorious and complete defense against this wicked and iniquitous conspiracy which the said Corning, Gillespie, Fairchild, [116] Hackett and the two Endicotts had concocted to cheat and defraud these plaintiffs out of their title to the said Johnson Group and against said false allegations of a fraudulent altering and changing of the corporate records upon which false and untrue and misleading allegations said conspiracy to cheat and defraud these plaintiffs was based in said cause No. 519-A; that counsel for these plaintiffs at the time of the trial of said cause had absolutely no knowledge of the fact that said Hackett and his co-conspirators had thus wrongfully taken said letter-press copy-books into their possession, nor did counsel have any knowledge of the contents of any of the books that

had been so taken from said storage warehouse.

And these plaintiffs further allege and show and aver the truth to be that said counsel for these plaintiffs, during the progress of the trial gave notice to counsel for plaintiffs in said cause No. 519-A to produce the books of the said Berner's Bay Mining and Milling Company which they had in their possession; that these defendants are claiming that *all* the said books, letter-press copy-books, documents, writings, papers and files that the said Wallace Hackett removed from the said Metropolitan Storage Warehouse as hereinbefore alleged are the property of the said company; that such notice to produce given as aforesaid, in the absence of all knowledge of the nature and contents of said books, could be and was no more than a general notice to produce; that the said plaintiffs in said cause No. 519-A not only utterly neglected and failed to produce the said books in court and utterly failed and neglected to show to Thomas S. Nowell any of the evidence that was in their possession at the time of their said direct examination of the said Thomas S. Nowell which would have enabled Thomas S. Nowell to refresh his memory concerning the transactions of ten [117] years before, but, on the contrary, the said Henry Endicott, William Endicott, Wallace Hackett, C. R. Corning, R. McM. Gillespie and S. W. Fairchild, and their agents, did everything in their power to suppress and conceal said corporate books, writings, and files and said letter-press copy-books and other books, from these plaintiffs, and thereby have wrongfully and fraudulently deprived them of their right

not only as absolute owners of a part of said evidence, but also as large and controlling stockholders of the said Berner's Bay Mining and Milling Company to inspect and consult said corporate books, writings and files, and said personal and private and said letter-press copy-books and account-books.

And these plaintiffs further allege and show and aver the truth to be that in consequence of the possession of said books, documents and papers and said letter-press copy-books these defendants and their agents had actual and full knowledge and notice of the fact that the alleged contract of sale to the said Berner's Bay Mining and Milling Company of the said "Johnson Group" that the said defendants and their agents were setting up in said cause No. 519-A was false and fictitious, that it did not at the time exist and never had existed in law, equity or fact, and that the allegations of its existence that were contained in said Bill of Complaint and Petition of Intervention filed in said cause No. 519-A were utterly false and fraudulent and untrue in every respect; that in consequence of the possession of said evidence, these defendants and their agents had actual and full knowledge and notice of the fact that the allegations of a wrongful and fraudulent altering and changing of the records of the Berner's Bay Mining and Milling Company or of the wrongful and fraudulent insertion in an offer of sale recorded in the minutes of the said stockholders' meeting of the words "last twelve" that were contained in said Bill [118] of Complaint and in said Petition of Intervention in said cause No. 519-A were absolutely false

and untrue and without the slightest foundation in law, equity or fact; that being in the possession of actual and full knowledge of the true state of the facts these defendants well knew that a decree ordering specific performance of the said false, fictitious and nonexistent contract as alleged and prayed for in said cause No. 519-A would be contrary to the truth and justice; that in consequence of the wrongful and fraudulent purloining, carrying away, secretion, and suppression of said corporate books, writings and files, and of said letter-press copy-books, and other books, which said evidence these defendants had been given notice to produce in court, the facts as they in truth and reality existed and do now exist were not elicited at the trial of said cause No. 519-A, but, on the contrary, were wilfully, wrongfully and fraudulently suppressed and concealed not only from the knowledge of these plaintiffs and their counsel but also from all knowledge of the Court as well; that in consequence of said wrongful purloining, carrying away, secretion and suppression of the said evidence and said wilful, wrongful and fraudulent concealment of the truth from these plaintiffs and from the court, these plaintiffs were prevented from making the meritorious and complete defence in said cause No. 519-A which they otherwise would have been able to make and were, in justice, entitled to make; that in consequence of said wilful and knowingly wrong and fraudulent purloining, carrying away, concealment and suppression of said evidence and of the truth, the trial court was kept in complete ignorance of the merits of the case as they

in truth and reality existed with the result that the real and true merits of the said cause No. 519-A were never presented to the trial court for an adjudication; that the complete ignorance of the trial court in said cause No. 519-A of the true and actual facts, merits and [119] circumstances of the case resulted entirely from said wilful, wrongful and fraudulent concealment and suppression by these defendants of said evidence and of the truth; that a production in court in accordance with the above-named notice to produce of said concealed and suppressed evidence would have resulted in a full and complete disclosure to the Court of the truth and of the gross and iniquitous fraud and deception that was being practiced upon it in said cause No. 519-A by these defendants and their agents; that the decree in said cause No. 519-A which is herein complained of was and is contrary to the truth and the actual facts and is for that reason unjust; that the unjust decree in said cause No. 519-A was the direct result of the false and perjured testimony of said William and Henry Endicott and of said wrongful and fraudulent concealment and suppression by these defendants and their agents acting therein for them of said evidence and therefore of the truth; that the said unjust decree in said cause No. 519-A resulted entirely from the fraud and imposition which these defendants deliberately and knowingly practiced upon the trial court in said cause; that the said unjust decree in said cause No. 519-A has resulted in great and irreparable damage not only to the property rights of these plaintiffs but also to their good

reputations, and to the good reputations of other innocent men not parties to the suit and having no interest whatsoever in the subject matter of said cause No. 519-A.

And these plaintiffs further allege and show the Court and aver the truth to be that thereafter and pursuant to said conspiracy the Petition of Intervention of the said Henry Endicott was prepared, which said petition is hereinbefore set out and which said Petition of Intervention contains identically the same latently vague, veiled, misleading allegations of fraud as are contained in the said Bill of Complaint as hereinbefore alleged and set out; [120] that the allegations contained in the 10th, 11th, 12th, and 13th, paragraphs of said petition which are here referred to without repeating the same are absolutely false and untrue and the said parties managing said litigation, to wit, the said Hackett, Corning, Gillespie, and Fairchild, as well as said L. P. Shackelford, of said firm of Shackelford and Lyons, who prepared said Petition of Intervention, had absolute knowledge of the fact that the allegations contained in the paragraphs aforesaid were absolutely false and untrue.

XXIV.

The plaintiffs further allege and show that thereafter, and about *one month subsequently* to the time that the deposition of the said Thomas S. Nowell had been taken at Juneau, Alaska, in said cause No. 519-A, and for the purpose of carrying out and consummating said fraud and deception and robbing and cheating these plaintiffs of their interest in and

title to the said “Johnson Group” of mines by means of a decree obtained by fraud, and deception and perjury, the depositions of the defendants, Henry and William Endicott were taken in behalf of the plaintiffs in said suit numbered 519-A, and in support of the false and fraudulent allegations of the said Bill of Complaint and of the said Petition of Intervention; and the said Henry Endicott testified in substance that on or about June 3, 1896, Thomas S. Nowell submitted to him a proposition to convey to the said Berner’s Bay Mining and Milling Company the said Johnson Group of mining claims, together with twelve (12) other certain mining claims, and further testified in substance that the directors of the said Berner’s Bay Mining and Milling Company never consented, to the knowledge of the said Henry Endicott to any modification of the proposal aforesaid, when in truth and fact the said Henry Endicott well knew that prior to the said stockholders’ meeting of June 24, 1896, the contemplated arrangement to turn over to the said Berner’s Bay Mining and Milling Company [121] and transfer to it the said “Johnson Group” or the option the said Nowells had thereon, had been entirely abandoned for the reason that the said company was unable to pay the purchase price therefor to the original owners. The said Henry Endicott produced and attached to his deposition an unsigned typewritten memorandum, dated at Boston, June 3, 1896, set out in the twelfth (12th) finding of fact as made by the Court in said cause numbered 519-A and hereinbefore set out, and testified to the fact that it embodied

the final terms of a contract to convey the said "Johnson Group" to the said Berner's Bay Mining and Milling Company that was at the time made by and between the said Endicott and the said Thomas S. Nowell, when in truth and in fact the said Henry Endicott well knew that the said document so produced by him did not embody, and was not intended to embody, the final terms of any such contract, but that, on the contrary, the proposition contained in said unsigned typewritten memorandum was a tentative proposition only which was not accepted by the directors of the said Berner's Bay Mining and Milling Company, but had been declined by the said directors for the reason that the financial condition of the said company did not warrant the assumption on its part of the obligation to pay the twenty-five thousand dollars (\$25,000) of purchase money to the original owners of the said "Johnson Group," and for the further reasons that the creditors of the said company and the associates and creditors of the said Thomas S. Nowell were unwilling to furnish the said purchase price of twenty-five thousand dollars (\$25,000), and that the said forty-six (46) bonds of the said company were purchased by the said Endicotts, Aaron Hobart, George Thacher, Charles H. Sawyer, Wallace Hackett and Guy Lamkin for the purpose of averting the failure and bankruptcy of the said company and Thomas S. Nowell, without regard to any proposed transfer of the said "Johnson Group" to the said company, as hereinafter [122] will be more particularly alleged and set out, and fi-

nally because the said Endicotts, Hobart, Thacher, Sawyer, Hackett and Lamkin believed that the said bonds were valuable and a good purchase; that the said Henry Endicott alleged in his Petition of Intervention that the said "Johnson Group" had been offered to the said Berner's Bay Mining and Milling Company by the said Thomas S. Nowell, and had been accepted by the said company at the stockholders' meeting held on June 24, 1896, and gave his testimony in support thereof when in truth and fact said Henry Endicott knew that said allegation and testimony were false and perjured for the reasons above stated, and for the further reason that the said Henry Endicott at a directors' meeting of the said Berner's Bay Mining and Milling Company held on June 30, 1896, had voted as a director of the said company to "approve and adopt" and "ratify and confirm" the acceptance by the stockholders at their said meeting of June 24, 1896, of the offer of the "last twelve" mining claims named in the call to the said meeting which offer and acceptance expressly excluded the said "Johnson Group"; that Henry Endicott produced and attached to his said deposition a rough draft of an offer to the said company of the "last twelve" claims named in the call, dated June 22, 1896, written in the handwriting of William M. Payson and signed by Thomas S. Nowell, on the face of which said rough draft were several interlineations, among which was an interlineation of the words "last twelve," and in support of the allegation in his Petition of Intervention of a fraudulent interlineation of said words "last twelve" said

Henry Endicott testified that said interlineation was made in the handwriting of the said William M. Payson, and testified as to its falseness and fraudulent character when in truth and fact the said Henry Endicott did not know the handwriting of the said William M. Payson, did not know when the said interlineation [123] was made, and well knew such allegation and testimony to be false and perjured; that the said Henry Endicott further produced and attached to his deposition and testified to its genuineness as the original call issued for the said stockholders' meeting of June 24, 1896, the said document set out in the 13th (XIII) finding of fact made by the Court in said cause numbered 519-A and hereinbefore set out, when in truth and in fact said Henry Endicott well knew that the said document so produced by him had never been issued as an original call but that in truth and in fact the original and recorded call for the said stockholders' meeting (Plaintiffs' Exhibit "F" in said cause No. 519-A) was the only call to the said meeting that had been issued to the stockholders of the said company, that it gave another and different arrangement in the third paragraph thereof of the names of the mining claims therein mentioned, but which said original and recorded call, after having wrongfully become possessed of the same, the said Henry Endicott and his co-conspirators and their agents suppressed and concealed and failed to produce in evidence; that at the time the said Henry Endicott gave his testimony to the effect that the said document set out in the said 13th (XIII) finding of fact

was the true call the said Endicott and his co-conspirators had actual and complete knowledge of the fact that the said original and recorded and only true call or notice to said stockholders' meeting of June 24, 1896, and signed by *all* of the directors of the said Berner's Bay Mining and Milling Company had been found by them amongst the files of the said company that Wallace Hackett had removed, as hereinbefore alleged, from the said Metropolitan Storage Warehouse, and the said Endicott and his co-conspirators at the time had further actual knowledge and notice of the existence of said original and recorded call signed by *all* the directors of the said company by means of the letters addressed to the nonresident [124] directors of the said company and written by the said Thomas S. Nowell in June, 1896, which said letters had been copied into the said letter-press copy-books then in the possession of these defendants and their agents and representatives, several of which said letters were addressed to the defendants Hackett and Fairchild and which said copies expressly and specifically stated that the said original and recorded call had been signed by *all* of the directors of the said company; that at the time the said Henry Endicott testified and swore to the fact that the said *unrecorded call* was the true and only call to said stockholders' meeting of June 24, 1896, he and his codefendants had in their possession the original of the true and recorded call signed by John F. Plummer and Samuel W. Fairchild as directors of the said Berner's Bay Mining and Milling Company, the possession

of which original call was concealed and suppressed by the said Henry Endicott and his co-conspirators; that the concealment and suppression of this said original call which was recorded in the record book of the said company were done by the said Henry Endicott and his co-conspirators with the specific intent to deceive the Court and to prevent the said Thomas S. Nowell from becoming informed as to its existence and from refreshing his memory by means of an inspection of the same; that the concealment and suppression by these defendants of this original recorded call to said meeting and the concealment and suppression of the said letter-press copy-books which show that the said recorded call is the true call were done by these defendants as a part of their said scheme and conspiracy to cheat and deceive the Court and to cheat and defraud these plaintiffs; and these plaintiffs further allege and show the Court and aver the truth to be that at the time the said Henry Endicott testified and swore to the fact that the said unrecorded call was the true and only call he well knew that his said testimony was false and perjured, and [125] he further well knew that the said recorded call was the true and only call to the said stockholders' meeting of June 24, 1896, that had been issued to the stockholders of the said Berner's Bay Mining and Milling Company; that the said Henry Endicott and his co-conspirators well knew and had actual knowledge and notice by means of the contents of the said letter-press copy-books in their possession that this said recorded call which was prepared in place of the first and defective call

to said meeting of June 24, 1896, as hereinbefore alleged, had been prepared in Boston not less than ten days before the said twenty-fourth day of June, 1896, and that the by-laws of the said company required that it should be sent out seven days only before the date of the said meeting for which it was issued; that with absolute knowledge and notice of all the foregoing alleged facts, the said Henry Endicott testified and swore that the said unrecorded call was the true call, and he and his co-conspirators these defendants, wilfully and fraudulently suppressed and concealed this knowledge and these facts from the Court with the intent to deceive it into making an untrue and unjust decree; that the said Henry Endicott testified in substance in said suit No. 519-A that he gave to Thomas S. Nowell his proxy to be voted at said stockholders' meeting held on June 24, 1896, for the purpose of carrying out the proposal to offer, sell and convey to the said Berner's Bay Mining and Milling Company the said "Johnson Group," together with twelve (12) other certain mining claims, and that he would not have so given his proxy had he not believed that the said "Johnson Group" was to be included in said offer of sale at said stockholders' meeting, when in truth and in fact the said Henry Endicott well knew that the plan to offer to the said company and to accept the offer of the said "Johnson Group" at the said stockholders' meeting had been wholly abandoned by the directors of the said company and by the associates and creditors [126] of the said Thomas S. Nowell prior to said meeting for the prudential reasons

hereinbefore alleged and more specifically herein-after alleged; and these plaintiffs further allege and show and aver the truth to be that the testimony of the said Henry Endicott in the said cause No. 519-A was taken upon written interrogatories and answers thereto, and that upon the face of which written testimony it would seem as if the said Henry Endicott had testified to matters and facts which were within his personal and absolute knowledge, when in fact and in truth the said Henry Endicott testified concerning matters and facts about which he had no personal or absolute knowledge whatever, but concerning which said matters and facts the said Henry Endicott had no more than the merest hearsay knowledge which he had derived from the statements made to him by his co-conspirators, and that the said Henry Endicott testified under oath and swore to the truth of his testimony concerning said matters and facts, carelessly and recklessly and without taking the slightest care or precaution to establish in his own mind by personal knowledge and observation the truth of his said testimony; that the testimony of the said Henry Endicott was false and perjured in the further fact that in the said suit No. 519-A the said Henry Endicott testified that the mines of the said Berner's Bay Mining and Milling Company were "too remote" for any other persons interested in them than members of the Nowell family to know about them, when in fact and in truth the said Henry Endicott well knew that he, with the other directors of the said company in June, 1895, had appointed the said Aaron Hobart, Wal-

lace Hackett and John F. Plummer as a committee to go to Alaska and examine the mines and books of the said company in Alaska, and to report to the directors of the said company upon their return to Boston; that the said committee in 1895 did go to Alaska and examine the mines and books of the said company and the said committee in September, 1895, did make a report to the directors of the said company and the said Henry Endicott had the opportunity to talk with the said Hobart, Hackett, and Plummer [127] upon their return to Boston, and did talk with them concerning the Alaskan mines and properties of the said company; and these plaintiffs further allege and show the Court and aver the truth to be that the said Henry Endicott gave his said testimony in said cause No. 519-A carelessly, recklessly, largely upon the merest hearsay without making the slightest effort to learn the truth, and with the intent and purpose to conceal and garble the truth and to create in the mind of the trial court a false and misleading impression and conception concerning the truth and real facts and merits of said cause No. 519-A, and with the intent and purpose to deceive the trial court into making an untrue and unjust decree against these plaintiffs.

These plaintiffs further allege and show the Court, and aver the truth to be, that the deposition of William Endicott was also taken in behalf of the plaintiffs in said suit and the said William Endicott gave his testimony and committed perjury in behalf of the false and fraudulent allegations contained in said Bill of Complaint and

said Petition of Intervention in said cause numbered 519-A in the following particulars, to wit: The said William Endicott testified in substance that on or about June 3, 1896, Thomas S. Nowell made a proposition to Henry Endicott to convey the said "Johnson Group" of mines, together with twelve (12) other certain mining claims, to the said Berner's Bay Mining and Milling Company to be carried out at the stockholders' meeting to be called for the purpose of authorizing said recapitalization of said company and rebonding of its properties, and that he, the said William Endicott, gave his proxy as a stockholder to Thomas S. Nowell to be voted at said meeting of June 24, 1896, upon the express understanding that it should be voted to carry out said proposition of June 3, 1896, including the purchase of the said "Johnson Group" of mines, when the said William Endicott, [128] at the time he gave his testimony, had absolute knowledge that the same was false and perjured, and that in truth and fact the contemplated arrangement to convey the said "Johnson Group" of mines to the said Berner's Bay Mining and Milling Company had been abandoned theretofore by the president and directors of said company for the prudential reason that said Berner's Bay Mining and Milling Company was unable to pay the purchase price of twenty-five thousand dollars (\$25,000) therefor to the original owners, and for other reasons alleged in this Bill of Complaint.

These plaintiffs further allege and show the Court that the said William and Henry Endicott further committed perjury in their said deposition taken as

aforesaid in testifying in support of the said false and fraudulent allegations aforesaid contained in said Bill of Complaint and Petition of Intervention in this: That the said Henry Endicott alleged in his said Petition of Intervention that he in June, 1896, had induced his associates to purchase and said William and Henry Endicott testified in substance that they and their associates purchased forty-one (41) of the then outstanding bonds of the said Berner's Bay Mining and Milling Company in consideration of and relying upon the agreement of the said Thomas S. Nowell to convey to the said Berner's Bay Mining and Milling Company the said "Johnson Group" of mining claims; that both the said William and Henry Endicott, at the time they gave such testimony, knew the same *to false* and perjured and were fully aware of the fact, and well knew that the said purchase so made was made by them and other associates of Thomas S. Nowell who were interested in the said Berner's Bay Mining and Milling Company was not "induced" by said Henry Endicott as alleged by him in said suit No. 519-A, but resulted solely from the personal influence and efforts of Thomas S. Nowell as president of said company with his said associates; that the said William and Henry Endicott were further also fully [129] aware of the fact, and well knew the purchase of the said forty-six (46) bonds of the said company, including the five (5) bonds purchased by the said Guy Lamkin, so made by them and other associates of Thomas S. Nowell was made solely for the benefit of and to maintain the credit and solvency of the said Berner's Bay Mining and Milling

Company and of the said Thomas S. Nowell and to protect the credit of the Tremont National Bank of Boston, Massachusetts, and of the said Thomas S. Nowell, and to protect themselves, the said Endicotts, Hobart, Thacher, Sawyer, Hackett, and Lamkin, the principal creditors and financial backers of the said company and said Thomas S. Nowell and at the time the said Endicotts gave testimony they knew it to be false and perjured, and by reason of the fact that they were stockholders of the said company and directors of the said bank, they were fully aware of and had actual and peculiarly full knowledge of the following circumstances and facts surrounding the said transactions of June, 1896, and the recapitalization of the said company in June, 1896, to wit: that the owners of the said forty-six (46) bonds were unwilling to join in extending their bonds with the owners of the remaining one hundred and fifty-four (154) first mortgage bonds of the said Berner's Bay Mining and Milling Company at that time outstanding, but were, on the contrary, threatening to take foreclosure proceedings against the said company; the bonds being then in default; that the purchase of the said forty-six (46) bonds from the then owners of the same was absolutely necessary in order to avert an immediate institution of foreclosure proceedings against the said Berner's Bay Mining and Milling Company; that upon a foreclosure, in 1896, of the mortgage of the said company, large pecuniary losses would have been sustained by the said Tremont National Bank, of Boston, Massachusetts, to which said bank the said Berner's Bay Mining and Milling

[130] Company was heavily indebted upon loans made by the said bank, not only upon the first mortgage bonds of the issue of 1892, but also upon the unsecured promissory notes or negotiable paper of the said company, and of which said bank, Aaron Hobart, its president, Henry Endicott, its vice-president, and a director, William Endicott, one of its directors, George Thacher, another of its directors, and D. E. Snow, its cashier, were each and all individually interested as stockholders in the said Berner's Bay Mining and Milling Company; that a foreclosure of the mortgage of the said Berner's Bay Mining and Milling Company, in 1896, would have seriously injured and impaired the personal credit and caused the failure of Thomas S. Nowell, one of the plaintiffs in this cause, president of the said company, who as an endorser of the negotiable paper of the said company and as promissor and endorser in his personal capacity was a large debtor of the said Tremont National Bank and of his associates, and in particular of the said Endicotts, Hobart, Thacher, Sawyer, Hackett and Lamkin; that on May 31st, 1896, the said Berner's Bay Mining and Milling Company was indebted to the said Tremont National Bank in the sum of eighty-eight thousand dollars (\$88,000) and upwards; that on May 31st, 1896, the said Thomas S. Nowell was indebted to the said Tremont National Bank in the sum of eighty-seven thousand dollars (\$87,000) and upwards; that on May 31st, 1896, the said Thomas S. Nowell was further indebted to the said Tremont National Bank in a large sum as the endorser of promissory notes of his associates, which

said promissory notes had been discounted at the said Tremont National Bank; that the said Thomas S. Nowell, on the said thirty-first (31st) day of May, 1896, was indebted to the said Endicotts, Hobart, Thacher, Sawyer, Hackett and Lamkin in the sum of five hundred and thirty-five thousand dollars (\$535,000) and upwards; that on the said thirty-first (31st) day of May, eighteen hundred and ninety-six (1896), the total indebtedness of the said Berner's Bay Mining [131] and Milling Company and Thomas S. Nowell to the said Tremont National Bank and to the said William and Henry Endicott, Aaron Hobart, George Thacher, Charles H. Sawyer, Wallace Hackett and Guy Lamkin, amounted to the enormous sum of seven hundred and twelve thousand dollars (\$712,000) and upwards; that in addition to this said enormous indebtedness there was at the time in question also a large indebtedness to the said Tremont National Bank and to the other associates of the said Thomas S. Nowell, which was owed by the said Nowell and his other gold mining companies, to wit; The Nowell or American Gold Mining Company and the Tremont Gold Mining and Milling Company; that the said Tremont National Bank loaned its funds to the said Berner's Bay Mining and Milling Company to the amount of eighty-three thousand dollars (\$83,000) and upwards upon the promissory notes of the said company endorsed by its seven directors; that the total amount of indebtedness to the said Tremont National Bank by the said Berner's Bay Mining and Milling Company, the said Thomas S. Nowell as promisor, and as endorser, and by his other gold min-

ing companies has been in excess of the proportion of the capitalization of the said bank allowed by the United States statutes; that this large indebtedness was incurred in the promotion and development of speculative and contingent gold mining enterprises; that during all these times the principal parties in interest, to wit, the said Endicotts, Hobart, Thacher, Sawyer, Hackett, Lamkin and the said Thomas S. Nowell all believed in and had faith in the intrinsic merit and value of the gold mining properties of the said Berner's Bay Mining and Milling Company, and believed that the shares of capital stock and first mortgage bonds of the said company were valuable and that the said bonds would be ultimately paid; that at the time in question, June, 1896, the principal resources of the said Thomas S. Nowell consisted of his interests in his said [132] gold mining companies; that the associates of the said Thomas S. Nowell had actual and full knowledge of the fact that unless the said Berner's Bay Mining and Milling Company could be made solvent and self-sustaining and a paying company, that the said Thomas S. Nowell would be unable to pay his large indebtedness, and his said associates well knew that they would be obliged to pay or lose, not only the large indebtedness of the said Thomas S. Nowell to themselves, but that they would themselves also be obliged to reimburse the said Tremont National Bank to the extent of upwards of one hundred and seventy-five thousand dollars (\$175,000); that, for these reasons, a recapitalization of the said Berner's Bay Mining and Milling Company on some such basis as was actually carried

out in June, 1896, was imperatively necessary in order to avoid a foreclosure in 1896 of the mortgage of the said company and maintain the credit and solvency of the said Berner's Bay Mining and Milling Company and of Thomas S. Nowell, its president, for the protection of the credit of the said Tremont National Bank and for the protection of the personal credit and pecuniary interest of the said associates and creditors of the said Thomas S. Nowell, and to provide the means whereby the said company would be enabled to raise further funds for the payment of its heavy indebtedness to the said Tremont National Bank and other floating indebtedness and for the continued operation of the mining business of the said company; that it was necessary to prevent or avert a foreclosure in 1896 of the mortgage of the said Berner's Bay Mining and Milling Company for the protection as well of the personal credit of the said Aaron Hobart, and Henry and William Endicott, and particularly of the said Endicotts, who did not wish it to become known that they were investing so heavily in mining ventures, and who did not wish it to become a matter of public knowledge that the said Tremont National Bank of which they were directors, and of [133] which its president, another director and the said Endicotts, had been using its funds to the extent of more than ten *per centum* of its total capitalization in promoting several undeveloped and speculative gold mining enterprises, and in which said gold mining enterprises the said Endicotts, two directors, the president (Aaron Hobart), cashier (D. E. Snow) and another director

(George Thacher) of the said bank were all personally interested either as stockholders or bondholders or both as stockholders and bondholders; that a recapitalization of the said company was imperative for the protection of Wallace Hackett, who was at the time a debtor for many thousands of dollars, both as promisor and endorser, to the said Tremont National Bank, and for the protection of Samuel W. Fairchild who was also a debtor of the said bank; that it was the express purpose of the said creditors and associates of the said Thomas S. Nowell in carrying through this said recapitalization of the said company to maintain the credit of the said Thomas S. Nowell and keep him from failing; that the alleged agreement of the said Thomas S. Nowell to convey or cause to be conveyed the said "Johnson Group" to the said company was not the actuating consideration or motive with these said creditors and associates in desiring to carry out said recapitalization; that it was a matter of no importance to the said creditors and associates of the said Thomas S. Nowell (Endicotts, Hobart, Hackett, Sawyer, Thacher and Lamkin), who owned the said "Johnson Group" whether the said Berner's Bay Mining and Milling Company or the said Thomas S. Nowell; that the foreclosure in 1896 of the said mortgage of the said Berner's Bay Mining and Milling Company could be prevented or averted solely by means of and only in case of the purchase by the said Thomas S. Nowell or his associates of the said forty-six (46) bonds and two hundred and ninety-two (292) shares of the capital stock of the

said company then owned by certain recalcitrant [134] bondholders who were, as aforesaid, refusing to extend their said bonds and were threatening to take foreclosure proceedings against the said company; and that the insolvency of the said Berner's Bay Mining and Milling Company which would have resulted from a foreclosure of its mortgage, would have seriously injured and impaired the credit and resources of the said Tremont National Bank, and of the said associates and creditors of the said Berner's Bay Mining and Milling Company and Thomas S. Nowell; and these plaintiffs further allege and show the Court and aver the truth to be that when the said Henry Endicott alleged and testified in said cause No. 519-A that he purchased the said eight (8) bonds of the said Berner's Bay Mining and Milling Company in June, 1896, relying upon the promise of the said Thomas S. Nowell to convey or cause to be conveyed the said "Johnson Group" to the said company, he well knew the said allegation to be false and fraudulent, and said testimony to be false and perjured; that at the time the said Henry Endicott alleged that he purchased the said eight (8) bonds relying upon the promise of the said Thomas S. Nowell to convey or cause the said "Johnson Group" to be conveyed to the said Berner's Bay Mining and Milling Company, and at the time the said Henry and William Endicott so testified the said Henry Endicott well knew said allegation to be false and fraudulent, and the said Henry and William Endicott well knew said testimony to be false and perjured in that the said Endicotts well knew

that the purchase in June, 1896, of the said forty-six (46) bonds of the said Berner's Bay Mining and Milling Company was made by the said Endicotts, Hobart, Hackett, Thacher, Sawyer and Lamkin for the express purpose of averting the threatened foreclosure of the mortgage of the said company as a matter of business expediency to save loss to themselves by enabling the said company thereby to secure further time in which to rehabilitate itself [135] and become a successful mining venture, and the said Endicotts further knew that the said purchase of the said forty-six (46) bonds by the said Endicotts, Hobart, Hackett, Thacher, Sawyer and Lamkin was not made as a permanent investment in the bonds of the said company or intended so to be, but was made by the said parties as a temporary expedient to enable the said company to meet the threatened crisis in its affairs and to remove all obstacles to the proposed recapitalization of the said company, and that after the proposed recapitalization of the said company had been accomplished it was the intention and purpose of the said Endicotts, Hobart, Hackett, Thacher, Sawyer and Lamkin to sell or cause the said forty-six (46) bonds to be sold for cash to outside parties and to retain the said two hundred and ninety-two (292) shares of the capital stock of said company as their profit upon the said transaction; and plaintiffs herein allege and show the Court that all knowledge of the foregoing alleged facts has been learned by their counsel since the spring of 1908, and that such present knowledge is due in part to the accidental dis-

covery in the spring of 1908 by Frederick D. Nowell, as hereinafter alleged, of the said letters written to him by the said Thomas S. Nowell in the year 1896, and is due in part to the production of sundry books as hereinbefore alleged by the defendants herein in pursuance of said order of Court June 20th, 1910.

These plaintiffs further allege and show and aver the truth to be that the said Henry and William Endicott in June, 1896, were interested in the said Berner's Bay Mining and Milling Company solely as stockholders, and that the recapitalization of the said company as then proposed was necessary to protect and preserve intact their stockholders' interest in the said company and to protect the interest which they personally had to the extent of upwards of one hundred and thirty-four thousand dollars (\$134,000) in the solvency of the said Thomas S. Nowell [136] which said sum was, in June, 1896, owed the said Endicotts by the said Thomas S. Nowell in his personal capacity; that the said Endicotts in participating in the said recapitalization of the said company and in approving of and adopting the same were actuated solely by a desire to prevent the failure of the said Thomas S. Nowell, believing that his said gold mining enterprises were meritorious ones and that the indebtedness of the said Thomas S. Nowell would ultimately be paid provided he were given time in which to achieve a success; that the said Endicotts did not regard it of any importance as to whether the said Berner's Bay Mining and Milling Company owned the title to the said "Johnson Group" or whether it was owned by

the said Thomas S. Nowell; that the said Endicotts regarded the ownership of the legal and beneficial title to the said "Johnson Group" by the said Nowells with complete acquiescence from the year 1896 to the year 1905, in which latter named year the said Endicotts joined the said Corning-Gillespie-Fairchild plan of reorganization of the said Berner's Bay Mining and Milling Company, and, in 1905, believing that the said Thomas S. Nowell could be of no further service to them, attacked him in the courts and sought to avoid the legal effect of their ten years of acquiescence by falsely alleging fraud against the said Thomas S. Nowell in pursuance to a conspiracy to prevent the said Thomas S. Nowell from making a meritorious defense to said false allegations of fraud and to deceive the trial court into making an untrue and unjust decree against these plaintiffs; that the said Henry and William Endicott were fully aware of the fact and well knew that the said sixteen (16) bonds so purchased by them in June, 1896, were but a small portion of the bonds of which they became the actual holders by purchase or otherwise made thereafter and after they knew of the abandonment of the intention ever to sell or offer the said "Johnson Group" of claims to the said Berner's Bay [137] Mining and Milling Company for that: *subsequently to June, 1896*, the said Henry and William Endicott, who were at the time directors of the said Tremont National Bank, and of which said bank Henry Endicott was the vice-president, the said Endicotts, acting in conjunction with Aaron Hobart, president of said Bank

and with George Thacher, another director of the said bank, and all of whom with the said Endicotts were interested as stockholders and bondholders in the said Berner's Bay Mining and Milling Company, induced said bank to loan to the said Berner's Bay Mining and Milling Company, for the use and benefit of said company, upwards of forty-nine thousand dollars (\$49,000) of the funds of said bank; that in addition thereto the said bank, *prior to June, 1896*, had been induced by the said Endicotts to advance its funds upon the bonds of the said Berner's Bay Mining and Milling Company as collateral security to the amount of upwards of eighty-eight thousand dollars (\$88,000), whereby the total amount known to these plaintiffs that was loaned by the said Tremont National Bank upon the bonds of the said company aggregated upwards of one hundred and thirty-eight thousand dollars (\$138,000) upon about seventy-two thousand dollars (\$72,000) face value of the said bonds; in addition to this direct indebtedness of the said company to the said bank a large indirect indebtedness was incurred subsequently to June, 1896, at the said bank by means of the said Endicotts, Hobart and Thacher inducing the said bank to discount to the amount of upwards of one hundred and fifty thousand dollars (\$150,000) the promissory notes, endorsed by the said Thomas S. Nowell, of said Nowell's associates and investors in his said gold mining enterprises; that the said William Endicott and Aaron Hobart received from the said Thomas S. Nowell at different times shares of capital stock of the Tre-

mont Gold Mining and Milling Company as a bonus in consideration of certain discounts that were had at the said Tremont [138] National Bank; that the said loan of this enormous sum of the funds of said bank as aforesaid was made by the procurement of and with the actual knowledge and consent of the said Henry and William Endicott and was made with the express intent and for the express purpose of promoting the said gold mining business of the said Berner's Bay Mining and Milling Company and Thomas S. Nowell, and as showing the speculative intent and purpose with which the said Endicotts, Hobart, and Thacher so loaned the funds of the said bank to the said company, these plaintiffs further allege and show and aver the truth to be that upwards of eighty-three thousand dollars (\$83,000), including interest, of the funds of the said bank were loaned to the said company upon its promissory notes endorsed by its directors and for a period of several years the said notes were renewed from time to time by the said bank, and the accrued interest money thereon added thereto without the said bank during these said times receiving a dollar of income from the said loans to the said company.

And these plaintiffs further allege and show the Court and aver the truth to be that the said bank *subsequently to the month of June, 1896*, was induced by the said Endicotts, Hobart and Thacher so to advance its funds to the said company upon the security of said mortgage bonds of the said Berner's Bay Mining and Milling Company, when in truth and in fact said Henry and William Endicott

well knew not only that the directors of said company had abandoned all intention or idea of purchasing said "Johnson Group" or taking over the option which Thomas S. Nowell had secured on the same, but also that the contemplated offer of a sale of mining claims by the said Thomas S. Nowell at the said stockholders' meeting of June 24, 1896, had actually been concluded by an offer and sale to said company of only twelve (12) claims, being the last twelve claims named in the recorded [139] original call as actually issued for said stockholders' meeting; that during all these times when the said Tremont National Bank was induced by the said Endicotts, Hobart and Thacher so to lend its funds to the said Berner's Bay Mining and Milling Company, the said Endicotts had actual knowledge and notice of the facts that the said "Johnson Group" had not been conveyed to the said Berner's Bay Mining and Milling Company, that the said Thomas S. Nowell and Willis E. Nowell were at all times claiming and had during all these times claimed to be the absolute and exclusive owners in fee simple of the said "Johnson Group" and the said Endicotts had actual knowledge and notice of the further fact that the mortgage deed of trust, dated July 1, 1896, given by the said Berner's Bay Mining and Milling Company to the said International Trust Company did not include in its terms and provisions any lien upon the said "Johnson Group," and the said Endicotts were further aware of and had actual knowledge and notice of the fact that at the time the said Tremont National Bank so loaned its funds as

aforesaid upon the security of said bonds, the said Berner's Bay Mining and Milling Company had never earned and paid a dollar either upon the principal or interest of its mortgage bond indebtedness, and of the further fact that the mortgage bonds of the said Berner's Bay Mining and Milling Company were at all these times aforesaid in default and the properties of the said Berner's Bay Mining and Milling Company subject to foreclosure of the said mortgage lien, except at such times when the said Endicotts, Hobart and Thacher as its directors had induced the said Tremont National Bank to loan its funds to the said company for the purpose of enabling the said company to pay, in part, the interest money that had accrued upon the mortgage bonds of the said company; that in addition to the said bonds delivered as aforesaid to the said Tremont National Bank at the [140] instance and with the consent and procurement of the said William and Henry Endicott, the said Henry and William Endicott subsequently to June, 1896, exchanged the said bonds of the said Berner's Bay Mining and Milling Company of the issue of 1892, which they purchased in June, 1896, for a like number of the new bonds of the said company of the issue of July 1st, 1896, which said exchange of the old bonds for the new bonds was made with full and actual knowledge of the fact that the said "Johnson Group" had not been conveyed to the said Berner's Bay Mining and Milling Company and which said exchange was made subsequently to the meeting of the directors of the said Berner's Bay Mining and Milling Company held

on June 30th, 1896, at which said meeting the said Henry Endicott voted with the other directors who were present at said meeting to ratify the identical records or minutes of the said stockholders' meeting of June 24, 1896, which the said Henry Endicott, as Intervenor in said suit No. 519-A, alleged had been fraudulently and wrongfully changed and altered by the said Thomas S. Nowell and Willis E. Nowell; and the said Henry and William Endicott further became the purchasers and holders of about one hundred and eighty (180) of the bonds of the said company which said purchase was made *subsequently to the month of June, 1896*, and after they knew not only that there had been an abandonment of any and all intention to sell or offer for sale to the said Berner's Bay Mining and Milling Company the said "Johnson Group" of claims, but that the contemplated offer of sale of mining claims by the said Thomas S. Nowell at the said stockholders' meeting of June 24, 1896, had actually been concluded by an offer and sale of only twelve (12) claims, being the last twelve named in the call for the meeting as actually issued; that being in possession of and having actual knowledge of the above-named state of facts and in addition to the said purchase acquiring and holding of the above-named large [141] number of bonds of the said company, the said William and Henry Endicott, during the period of time between June, 1896, and June 30, 1899, advanced to the said Berner's Bay Mining and Milling Company and to the said Thomas S. Nowell personally, and for the benefit and use of said company, the enormous sum

of upwards of four hundred and eighty thousand dollars (\$480,000); and having actual knowledge of all the hereinbefore alleged facts, the said William and Henry Endicott have permitted and encouraged the said Thomas S. Nowell to sell for cash to outside parties a large number of said bonds when the said William and Henry Endicott in truth and in fact well knew that the new mortgage deed of the Berner's Bay Mining and Milling Company, dated July 1, 1896, did not and was not intended to include the said "Johnson Group" in its terms and provisions, and that the said "Johnson Group" was not in any way subject to the lien of said mortgage, and that said mortgage bonds of the said Berner's Bay Mining and Milling Company were in default for non-payment of the accrued interest money, and that the said company had not earned any of the interest money that had accrued on its mortgage bonds.

And these plaintiffs further allege and show the Court and aver the truth to be that during all these times said William and Henry Endicott and the other stockholders and bondholders of said company have been actively co-operating with the said Thomas S. Nowell in his efforts to negotiate a sale of the properties of said Berner's Bay Mining and Milling Company, and in so doing the said William and Henry Endicott and the other stockholders and bondholders of said company have entered into or acquiesced in various contracts with these plaintiffs and other parties, which said contracts were negotiated by the said Thomas S. Nowell as the duly authorized agent, by unanimous [142] consent,

of all the stockholders of the said Berner's Bay Mining and Milling Company, with intending purchasers of the properties of the said company, which said contracts expressly recognized and acknowledged the absolute and exclusive ownership of the title to the said "Johnson Group" by these plaintiffs; that the defendants, the said Hackett and Endicotts, have become parties to or have expressly acquiesced in these said contracts wherein the absolute and exclusive title of the said Thomas S. Nowell and Willis E. Nowell to the said "Johnson Group" has been expressly recognized and acknowledged by the parties thereto, some of which said contracts are noted and quoted from in the Petition to open up decree for fraud of the parties in procuring the same, which said petition is attached as an exhibit to the affidavit of George M. Nowell and which said affidavit is made a part of this Bill of Complaint; that the said Endicotts during all these times and up to the time of the bringing of said suit No. 519-A have always acquiesced in and expressly acknowledged in writing the absolute and exclusive ownership by these plaintiffs of the legal and beneficial title to the said "Johnson Group," which said acts of acquiescence in and express acknowledgment of the absolute and exclusive ownership of said "Johnson Group" by these plaintiffs were done by William and Henry Endicott during the six or eight years next preceding the bringing of said suit No. 519-A and the giving by said Endicotts of said false and perjured testimony in support of said false, fraudulent, and untrue allegations in said cause No. 519-A; that in addition to

all of these overt acts showing absolute and unqualified acquiescence in and assent to the absolute and exclusive ownership by these plaintiffs of the legal and beneficial title to the said "Johnson Group" the said Endicotts have freely and with full knowledge and notice of all the facts participated with the other stockholders of the said Berner's Bay Mining and Milling Company in [143] various transactions of the said company wherein the said absolute and exclusive ownership by these defendants of the said "Johnson Group" was recognized and conceded and ratified and confirmed; that during all these times and in all these said transactions the said Henry Endicott acted under a general power of attorney as the duly authorized and lawfully appointed agent in fact of the said William Endicott; that Henry Endicott, Intervenor in said cause No. 519-A, is but a small stockholder, owning but three hundred (300) shares out of a total of twenty-five thousand (25,000) shares of the capital stock of the said Berner's Bay Mining and Milling Company; that the said Henry Endicott is the only shareholder or bondholder of said Berner's Bay Mining and Milling Company that has ever complained of the transaction as actually carried out at said stockholders' meeting held on June 24, 1896; that said William and Henry Endicott rested content and acquiesced therein without objection for nearly ten years before making any complaint whatsoever; that during all these times which extend over a period of nearly ten years, the said Endicotts, Hackett, Hobart, Thacher, Sawyer and Lamkin, being all the parties to the purchase,

in June, 1896, of the said forty-six (46) bonds, and all the other stockholders of the said Berner's Bay Mining and Milling Company, have, without variation, exception or objection, each and all acquiesced in and assented to each and every corporate transaction of the said company that was had prior to, during and since June, 1896, and they have expressly ratified and confirmed all of the acts, whether official or otherwise, that have been performed by Thomas S. Nowell on behalf of the said company, and all parties in interest, in particular the said Endicotts, have encouraged Thomas S. Nowell and Willis E. Nowell in their belief, contention and claim of absolute and exclusive ownership of the said [144] "Johnson Group," and have always assented to said ownership as an undisputed fact; that after all these ten years or more of co-operation, acquiescence and mutual trust and confidence between himself and said associates and all other parties in interest, the said Thomas S. Nowell could not well foresee or anticipate that any of his said associates would commit perjury and falsely charge him with a gross fraud in the management of the said Berner's Bay Mining and Milling Company.

That long before the time when said Endicotts gave said depositions as aforesaid they had become the holders and owners of the said seventy-two (72) bonds so deposited with the said Tremont National Bank by liquidating the balance of said bank out of their personal resources and thereby taking over said bonds.

And these plaintiffs further allege and show the

Court and aver the truth to be that the said false and perjured testimony herein set out and referred to was the only evidence given in support of said false findings of fact so made by the Court in said cause No. 519-A, and without the said false and perjured testimony, there was no evidence whatever to support said findings or said decree; that the said perjured testimony was given and the said false evidence was produced in court pursuant to and as a part of the same fraudulent scheme and conspiracy, which was concocted by these defendants for the purpose of putting it out of the power of the said Thomas S. Nowell and Willis E. Nowell to defend the said suit No. 519-A, and which said conspiracy was carried out by means of the wrongful carrying away and fraudulent concealment of material evidence and suppression of the truth and of all opportunity of learning the truth, and which said conspiracy was perpetrated by these defendants [145] with the specific object in view and with the premeditated intent to deceive the Court into making a false, untrue and unjust decree against these plaintiffs; that in consequence of this said false, untrue and unjust decree which the Court was deceived into making, the just and rightful property of these plaintiffs has been decreed away and their good reputations blasted; and that these defendants are in possession of the said property, and are holding the same as the profit they have derived from the gross and iniquitous fraud and deception which, consciously and by means of wicked scheming and premeditated outrage, they have succeeded in practicing upon a court of equity.

XXV.

That the plaintiffs herein did not discover the said fraud and the facts connected with the suppression of the evidence aforesaid and of the facts shown by said books and papers and letter-press copy-books until long after the trial and appeal of said cause, and by the use of ordinary diligence could not have discovered the same, and did not and could not anticipate and by the use of ordinary diligence could not have prepared themselves to anticipate the false and perjured evidence given by the Endicotts and the suppression of said evidence as aforesaid; that the facts connected with said fraud and conspiracy, suppression of evidence and the false and perjured testimony hereinbefore set out, as well as the collateral facts hereinbefore alleged showing the acquiescence for ten years of the said Endicotts in the precise state of facts of which they complained in said suit No. 519-A, were not learned by these plaintiffs or their counsel until about the sixth (6th) day of November, 1908, and these plaintiffs allege and show and aver the following facts and reasons, to wit: that the plaintiff Willis E. Nowell, one of the defendants in the original suit No. 519-A, had nothing at all [146] to do with and took no part in the transaction of June, 1896; that he was in 'Alaska at the time; that he knew nothing at all about the negotiations in June, 1896, between Henry Endicott and Thomas S. Nowell; that he knew nothing at all about Thomas S. Nowell's business transactions and business papers; that he knew of no evidence and could give counsel no information or assistance

in discovering evidence that was pertinent to or explanatory of said transactions of June, 1896; that the only person in the world connected or associated in 1896 with these plaintiffs, besides Thomas S. Nowell, who had actual knowledge of said transactions of June 1896, was Arthur L. Nowell, a son of Thomas S. Nowell, who had acted, during all these times, in the capacity of private secretary and confidential clerk for Thomas S. Nowell and to whose personal attention Thomas S. Nowell had entrusted all the details of his business affairs; that said Arthur L. Nowell had died in January, 1904, two years before the original suit No. 519-A was brought; that Thomas S. Nowell, owing to the fact that all of the details of his business had been attended to by said Arthur L. Nowell, deceased, and also owing to his extreme age of 74 years, and the lapse of nearly ten years, was unable at the time of the trial to remember the details of said transactions of June, 1896, or the reason why the plan of offering the "Johnson Group" to the said Berner's Bay Mining and Milling Company had been changed prior to the stockholders' meeting of June 24, 1896, his memory being almost completely defective concerning said transactions of June, 1896; that he was therefore unable to give his counsel any assistance or advice in the discovery of any evidence; that he had no recollection or knowledge whatsoever that the evidence that was being suppressed by these defendants was in existence at all; that therefore at the time of the trial of said cause No. 519-A, [147] there was no person living who had any knowledge whatsoever of the circumstances surrounding said

transactions of June, 1896, or of the existence of any evidence that would throw light upon the same; that the trial in the United States District Court at Juneau was had in April, 1906, and in January, 1907, the Court decreed for plaintiffs, from which decree these plaintiffs appealed to the United States Circuit Court of Appeals for the Ninth Circuit, which appeal was argued on May 27, 1907, and in June, 1908, the court of appeals affirmed the decree of the lower court.

And plaintiffs further allege and show that George M. Nowell, another son of Thomas S. Nowell, was not in any way connected as counsel with the original cause No. 519-A until about February or March, 1907, subsequent to the decree of the trial court and to the appeal of said cause; that he did not receive a copy of the record of said original cause and appeal until about April, 1907; that prior to the trial of said cause at Juneau said George M. Nowell called to see William M. Payson at his office, for the purpose of ascertaining whether or not said Payson could testify concerning the matters in issue in said cause; that said Payson understanding, or rather misunderstanding, that his testimony was desired regarding the negotiations between Thomas S. Nowell and Henry Endicott in June, 1896, replied that he knew nothing about the transaction and therefore would not be able to testify; that after the decree in January, 1907, of the trial court and after said George M. Nowell had become identified with said cause as counsel for appellants, the plaintiffs herein, he went again to see said Payson, and told him that

the issue involved in said suit No. 519-A was an alleged fraudulent altering and changing of the records of the meeting of the stockholders of the Berner's Bay Mining and [148] Milling Company, held on June 24, 1896, and that the lower court had held that said records had been fraudulently changed and altered as alleged, whereupon said Payson then and there stated that the records were correct and true and that he could testify and desired to testify to that effect; that thereupon, upon the request of said George M. Nowell, said Payson made his affidavit, dated May 1st, 1907, deposing and saying that the records are correct and true, and on May 27, 1907, immediately before the argument of the appeal of said cause, said George M. Nowell moved the Court of Appeals to admit this said Payson affidavit in evidence and make it a part of the record, or to order the deposition of said Payson to be taken with opportunity for the appellees to cross-examine; that the court of appeals denied said motion without expressing any opinion or giving any reason therefor; that after the affirmance on June 8, 1908, by the said Court of Appeals of the decree of the District Court, sixty days was granted in which to file a petition for a rehearing.

And plaintiffs further allege and show that in the month of February or March, 1908, at Boston, Massachusetts, Frederick D. Nowell, formerly receiver of the Berner's Bay Mining and Milling Company, while looking through his personal papers concerning other matters not relating to the issues involved in said original cause No. 519-A, accidentally found,

scattered through his said private papers, the originals of several letters written to him by Thomas S. Nowell in the year 1896, which said letters had been copied into said letter-press copy-books which, in October, 1905, had been wrongfully taken from said Metropolitan Storage Warehouse by Wallace Hackett, and which said letter-press copy-books had been fraudulently suppressed by these defendants as hereinbefore alleged; that upon the perusal of said original letters it was discovered by said George M. Nowell [149] that they had a direct bearing upon the issues involved in said original suit No. 519-A, and revealed the reason why the change in the offer to the said company had been made, concerning which reason, owing to his entirely defective memory, Thomas S. Nowell, at the trial, had been unable to testify.

These plaintiffs further allege and show the Court that this was absolutely the first knowledge that had come to counsel for these plaintiffs of the fact that the said letter-press copy-books contained any evidence or that there existed any evidence at all that was pertinent to and explanatory of the said transactions of June, 1896; that it was by the merest accident then discovered; that the appeal of the original suit had at that time been pending for about ten months and a decree by the court of appeals was looked for any day by these plaintiffs; that when the decree of the lower court was affirmed by the court of appeals, George M. Nowell, as counsel for the appellants, the plaintiffs herein, prepared a Petition Relating to Decree and Mandate, which petition was

filed in the said court of appeals on or about August 3, 1908; that said petition relating to Decree and Mandate set forth the fact of the discovery of new evidence, and that said new evidence would prove that the decree in said suit No. 519-A was not in accordance with the truth and the facts as they in truth existed, and prayed the said court of appeals to allow or order the taking of further testimony in said cause and cited United States Supreme Court and Federal Court decisions to show that the court, in the interest of justice, had power so to order; that this petition was on November 2, 1908, denied by the court of appeals without expressing any opinion or giving any reason or ground upon which such denial was based. The mandate issued in December, 1908.

And these plaintiffs further allege and show that the discovery [150] in February or March, 1908, by said Frederick D. Nowell of this new evidence was purely accidental and entirely unexpected, for the reason that he had had no interest in or connection with said transactions of June, 1896; that he has never owned a share of stock of the said Berner's Bay Mining and Milling Company; that his sole connection with said company was as its local agent at Juneau, and subsequently thereto a receiver of said company until about September, 1906; that having taken no part in the negotiations of June, 1896, he had no knowledge of the same, and could for that reason have no recollection thereof; that he remained in office as agent of the said company, and later on as receiver, much against his will and to his great pecuniary damage; that he continued to act thus as agent

and later on as receiver solely out of regard for the wishes of Thomas S. Nowell and his principal financial associates and backers, all of whom had expressly desired and petitioned for his appointment as receiver, and, some of whom, in particular the Endicotts, had objected to his intended resignation as receiver, and who had also objected to the termination of the receivership and discharge of the receiver, which course said Frederick D. Nowell had urged upon and advocated to said Thomas S. Nowell and his said associates; that the recapitalization of the said Berner's Bay Mining and Milling Company, which resulted from negotiations extending over a period of about one year prior to June, 1896, was to said Frederick D. Nowell merely an incident in the financial policy of the company, over which he had no control and in which he had no interest; that as he had at that time, in 1896, no interest whatsoever in or to said "Johnson Group" or in the said Berner's Bay Mining and Milling Company, the transactions of the year prior to and including June, 1896, had made no impression upon his mind or memory, and that therefore all incidental or hearsay knowledge he may have had of any of the circumstances surrounding said transactions had, in the intervening [151] ten years, entirely passed from his mind; that so far as said Frederick D. Nowell was concerned the transactions of June, 1896, were at the time of the trial of said original cause No. 519-A, a blank; that he was not put upon notice why he should search amongst his personal papers, the accumulation of about fifteen years; that the accidental discovery of said evidence

was made nearly one year after the appeal of said cause No. 519-A had been argued in the said court of appeals; that in addition to all these facts his official position as receiver of the company and officer of the court and as one of the party plaintiffs of record in the original suit was legally antagonistic to these plaintiffs (defendants in the original suit); that he, with W. B. Hoggatt, as coreceiver, were the parties complainant of record who, as receiver of the said company, were suing these plaintiffs for a conveyance to said Berner's Bay Mining and Milling Company of said "Johnson Group"; that said Frederick D. Nowell, as such receiver, had been falsely charged by counsel (Shackleford & Lyons) for the plaintiffs in the original suit, with acting in collusion with these plaintiffs for the purpose of defrauding the said Berner's Bay Mining and Milling Company out of the said "Johnson Group"; that the said W. B. Hoggatt had been appointed coreceiver for the express purpose of bringing said suit No. 519-A and had been authorized by the Court to have the management of said original suit; that prior to the appointment of said W. B. Hoggatt as coreceiver, said F. D. Nowell, as receiver, had refused to verify the Bill of Complaint in said suit No. 519-A for the reason that he knew of no evidence to justify the allegations therein contained, and had no knowledge or recollection of any facts that would justify him in swearing to a belief in the truth of the allegations of fraud contained in [152] said Bill of Complaint; that subsequently to the appointment of said W. B. Hoggatt as coreceiver for the express purpose of bringing said

suit No. 519-A, said Frederick D. Nowell, for these reasons, and in view of said charges of bad faith, felt in duty bound to maintain a perfectly neutral, unpartisan, and passive attitude towards said suit, which said neutral, unpartisan, and passive attitude he consistently maintained during the whole litigation; that in his opinion any partisan act on his part looking towards or assisting in a defeat of said suit would be improper and in conflict with his official oath and duty; that said Frederick D. Nowell was not present at Juneau during the trial of said suit No. 519-A in April, 1906, but was in Seattle, Washington.

These plaintiffs further allege and show and aver the truth to be that after the decree of the lower court in said original cause No. 519-A and during the pendency of the appeal thereof, the trial of the Berner's Bay Mining and Milling Company receivership case (Numbered 603 and 536-A, consolidated on the docket of the United States District Court at Juneau, and the appeal of which is entitled *Nowell et al. v. International Trust Company et al.*, and numbered 1641 in the United States Circuit Court of Appeals for the Ninth Circuit) was had before Judge Wickersham at Juneau, Alaska; that in this latter named cause, evidence was adduced by the receiver McBride to show the acquiescence of the bondholders of said company in the appointment of the receiver and their consent to the priority of the receiver's indebtedness, which said evidence was composed largely of contracts that had been entered into by the Endicotts and the other bondholders looking towards a reorganization of the said Berner's Bay Mining and Milling

Company; that this said evidence was introduced by and on behalf of the receiver McBride as a part of his case and for [153] the purpose of showing the consent of the bondholders of said company to the incurring of the receiver's indebtedness as a first lien upon all the property of said company; that this said evidence also showed that the Endicotts and the other stockholders and bondholders of said company had for many years prior thereto acquiesced in and expressly acknowledged the absolute, exclusive, and rightful title of these plaintiffs to said "Johnson Group," the property in dispute; that this evidence, taken alone, did not and could not disclose to these plaintiffs or their counsel the fraudulent conspiracy, suppression of evidence, and deception that had been perpetrated by these defendants upon these plaintiffs and upon the court in said original suit No. 519-A; that this said fraudulent conspiracy and deception could only be discovered and made apparent by taking in connection with the said original letters hereinbefore referred to, the evidence that had been adduced by the receiver McBride in the above-mentioned Berner's Bay Mining and Milling Company receivership case; that the evidence introduced by the receiver in said receivership case was unknown to George M. Nowell until some time subsequent to the 31st of October, 1908, and then only after he had, on that day, received at Omaha, Nebraska, while *en route* from Boston, Massachusetts, to San Francisco, California, a copy of the voluminous record, consisting of seven large volumes, of the appeal of said receivership case; that this was the first knowledge said

George M. Nowell had of the evidence contained in said record; that owing to the great length of said record, upwards of 2,600 pages, the connection between the newly discovered evidence and facts and the fraudulent conspiracy into which these defendants had entered was not discovered by said George M. Nowell until the morning of November 6, [154] 1908; said George M. Nowell appearing as intervenor only in said Berner's Bay Mining and Milling Company receivership case with Gilmer Clapp, representing as a reorganization committee upwards of \$120,000 of receiver's certificates and debts of the receiver, which trusteeship they had accepted pursuant to a plan and desire to protect the interests of all the creditors of said company; that said George M. Nowell had nothing at all to do with the management of the trial of said receivership case, was in Boston, Massachusetts, at the time, and had no knowledge of the facts that had been adduced in said trial until some time subsequent to the 31st day of October, 1908; that upon discovering on November 6, 1908, the peculiar and significant connection between the evidence contained in the record of said receivership case and the letters which had been discovered some few months prior thereto, and also perceiving for the first time that it was a matter of record that L. P. Shackleford, of said law firm of Shackleford & Lyons, had had actual possession of the said letter-press copy-books that had been wrongfully taken and suppressed as hereinbefore alleged, said George M. Nowell at once prepared a petition to reopen the decree in the original cause for fraud of the parties in

procuring the same, which said petition was submitted on November 7th, 1908, within twenty-four (24) hours after the discovery of said fraud, to the said United States Circuit Court of Appeals; that after argument of counsel during which the Court asked the said George M. Nowell many questions concerning the facts, the Court said that on account of its being a court of appellate jurisdiction, it had no power to reopen the decree as prayed for, but the Court further said that the proper course for appellants (plaintiffs herein) to pursue would be to bring a suit in the trial court to try out the charges of fraud on the merits, and if proved to be true, to have the decree in said cause No. 519-A set aside and annulled; [155]

The plaintiffs further allege and show and aver the truth to be that until the trial in April, 1907, at Juneau, Alaska, of the said Berner's Bay Mining and Milling Company receivership case, they had absolutely no knowledge of the fact that any letter-press copy-books had been wrongfully removed by the said Wallace Hackett from the said storage warehouse; that until the spring of 1908, when the said Frederick D. Nowell discovered the said letters hereinbefore mentioned, these plaintiffs and their counsel had no idea or suspicion even that the said letter-press copy-books contained any evidence at all that was explanatory of the said transactions of June, 1896, or that would or could enable the said Thomas S. Nowell so to refresh his memory that he would be able to explain said transactions; that the discovery of the said fraud and conspiracy hereinbefore alleged and set

out was not made until after the decree of the said trial court in said suit No. 519-A had been affirmed by the said Circuit Court of Appeals for the Ninth Circuit.

These plaintiffs further allege and show the Court and aver the truth to be that the record of said Berner's Bay Mining and Milling Company receivership case discloses the fact that some of these said letter-press copy-books were, at the time of the trial of that case, in the actual possession of Lewis P. Shackleford, one of the partners of the law firm of Shackleford & Lyons, attorneys at law at Juneau, Alaska, which said law firm represented these defendants in the original suit No. 519-A; that this was the first knowledge that had come to these plaintiffs or their counsel that any letter-press copy-books had wrongfully been removed by said Wallace Hackett from said storage warehouse; that upon learning this fact, these plaintiffs made demand upon said L. P. Shackleford for said letter-press copy-books, [156] but said Shackleford under oath deposed and said that he had received the books or the one that had been in his possession, in March, 1905, but that he had since sent them or it out of the jurisdiction, having returned them or it to C. R. Corning through whom he had received them from William and Henry Endicott, and that they were beyond his control; that efforts were then made by these plaintiffs elsewhere to discover the whereabouts of said books but without avail; that at the time these plaintiffs and their agents were seeking to discover where the said letter-press copy-books had been concealed by the said Hackett

and his co-conspirators and to recover the possession of the same, neither of these plaintiffs nor their counsel or agents had any knowledge of the contents of the said letter-press copy-books, or of the fact that they contained evidence that was explanatory of or would enable the said Thomas S. Nowell to explain concerning the conditions and circumstances surrounding the said transactions of June, 1896, and leading up thereto.

And these plaintiffs further allege and show and aver the truth to be that on June 20, 1910, this Court made an order in the above-entitled cause that these defendants produce the books, documents, writings, papers and files of the Berner's Bay Mining and Milling Company and two certain letter-press copy-books that Wallace Hackett removed from the said Metropolitan Storage Warehouse and deposit the same with Charles K. Darling, Esquire, Clerk of the United States Circuit Court at Boston, Massachusetts; that in pursuance to said order of court said Hackett and Corning two of these defendants, deposited on or about September 1st, 1910, with the said Darling sundry books and papers purporting to be all the books and papers of the said company and in addition thereto *six* letter-press copy-books, [157] and three cash-books and two account-books of Notes Payable and Receivable, the personal property of the said Thomas S. Nowell; that prior and up to September 1st, 1910, and since April, 1907, these plaintiffs had all along believed that the said Hackett had taken from the said storage warehouse no more than two certain letter-press copy-books marked "R" and "S"

of the personal books of the said Thomas S. Nowell; that an examination of the said six letter-press copy-books disclosed to these plaintiffs the fact that these defendants had failed to deposit all the letter-press copy-books that the said Hackett had removed from the said storage warehouse, but were, in defiance of the said order of Court, continuing to withhold and secrete and suppress other letter-press copy-books; that thereupon these plaintiffs prepared a motion and filed the same in this court praying for an order for the production of these said additional letter-press copy-books, whereupon the said C. R. Corning deposited with the said Darling three other letter-press copy-books making a total of nine (9) letter-press copy-books deposited by the said Hackett and Corning with the said Darling.

And these plaintiffs further allege and show and aver the truth to be that the discovery of this said fraudulent conspiracy and wilful perjury of the Endicotts was rendered very much more difficult by the fact that the Endicotts for a decade or more had been the trusted associates of the said Thomas S. Nowell, and that during all these years they had reposed implicit and unquestioning trust and confidence in the said Thomas S. Nowell, which trust and confidence had been reciprocated and they had always been held by him in the highest esteem as honorable and just men; that the discovery of said conspiracy to defraud these plaintiffs has been made possible only by a piecing together of a series of single and almost unrelated facts, no one of which was sufficient to give notice to counsel of the actual [158] state

of facts as they (as a whole) in reality existed; that the discovery has been made by counsel having no previous knowledge whatever of the facts and without the slightest assistance received from these plaintiffs, which assistance was lacking owing to the entire ignorance of Willis E. Nowell, one of these plaintiffs, of the facts and the defective memory of the other plaintiff caused and brought about by extreme age and the lapse of ten years, and the death of a material witness; that had the said Thomas S. Nowell had any knowledge of the existence of the evidence that these defendants have thus wilfully, wrongfully, and fraudulently suppressed, and search had been made for the same, it would not and could not have been made available to these plaintiffs, for the reason that said Hackett and his co-conspirators had wrongfully and fraudulently taken the same out of the possession of said Thomas S. Nowell and were secreting and suppressing the same with the intent and purpose to deprive these plaintiffs of all use and inspection of the same and thereby to deprive them of all opportunity to make a meritorious, just, and adequate defense in said cause No. 519-A, which said cause these defendants well knew to be false and fictitious and based upon false, fraudulent, and fictitious allegations of fraud; that at the time of the trial of said cause No. 519-A, George M. Nowell was the only son of Thomas S. Nowell who was living in Boston, Massachusetts; that said George M. Nowell had never been employed in any capacity whatsoever in the office of Thomas S. Nowell and was therefore almost entirely unfamiliar with the business transactions of said Thomas S.

Nowell; that he had no knowledge at all of the transactions of June, 1896; that the business files of Thomas S. Nowell were very voluminous being the accumulation of many years; that had he been instructed [159] to search for evidence amongst the business files of Thomas S. Nowell, he would not have known where to look or what to look for; that as said George M. Nowell had no knowledge at all of the business files of said Thomas S. Nowell, a search by him would not have disclosed to him the fact that said letter-press copy-books had been wrongfully abstracted and removed by said Hackett as hereinbefore alleged and set out.

And these plaintiffs further allege and show and aver the truth to be that the discovery of this said conspiracy to defraud these plaintiffs and of the fraud that was practiced upon the court, has been hampered, delayed, and rendered well-nigh impossible by the entire ignorance of Willis E. Nowell of all of the facts of said transactions of June, 1896; by the entire ignorance of Thomas S. Nowell, the other plaintiff, of all of the facts contained in said suppressed evidence and of the fraudulent conspiracy and fraudulent suppression and concealment of said evidence, which said ignorance resulted from extreme old age, from the lapse of nearly ten years, from the fraudulent concealment and suppression of said evidence as aforesaid and from an almost totally defective memory, and which said ignorance was without negligence or fault on the part of said Thomas S. Nowell; by the lapse of nearly ten years and the therefrom resulting total lack of memory or recollec-

tion of all the facts by all of the persons who were indirectly concerned in or had any hearsay knowledge of said transactions; by the death of a material witness of much younger years and therefore keener memory, who was the only other person in the world besides Thomas S. Nowell who did have actual knowledge of the facts and circumstances surrounding the said transactions of June, 1896; by the wrongful and fraudulent taking and carrying away of the personal property of one of these plaintiffs containing the [160] written evidence of the absolute innocence of these plaintiffs of the fraud charged; by the intentional and fraudulent concealment and suppression of said written evidence; by the fraudulent concealment of the truth from all knowledge of the trial court; by the iniquitous and absolutely unanticipated perjury of old and trusted friends and associates who in turn had trusted and received loyalty; by the wrongful purloining and secretion and suppression of the corporate records containing material and conclusive evidence by a director and stockholders of said company and their associates and agents; by the complete ignorance of counsel of all the facts, and the utter inability and disability of these plaintiffs to assist or advise counsel in securing any evidence at all. The discovery has resulted entirely from extraneous and accidental circumstances, and counsel, from time to time as the facts become known to them subsequently to the appeal of the said original cause No. 519-A, have done everything within their power and used the utmost diligence to present to the said United States Circuit Court of

Appeals for their consideration all the facts known to counsel that had any bearing upon the issues raised in said appeal and finally upon the oral suggestion from the bench of the said Circuit Court of Appeals, this suit was instituted on the second (2d) of March, nineteen hundred and nine (1909), less than four months from the time the said fraudulent conspiracy was discovered, during which four months counsel for these plaintiffs were obliged to travel by land and sea, in the performance of their professional duties, upwards of 8,000 miles before this suit could be filed in the United States District Court at Juneau, Alaska.

XXVI.

Plaintiffs further allege and show the Court that at the time the said cause No. 519-A was commenced the said United [161] States District Court for Alaska, Division Number One, at Juneau, was without jurisdiction to hear and determine said cause and that the decree in said cause is null and void for want of jurisdiction; that the action in said cause No. 519-A was brought by the said Frederick D. Nowell as receiver of the property of the said Berner's Bay Mining and Milling Company, and by one W. B. Hoggatt as coreceiver with the said F. D. Nowell; that the said W. B. Hoggatt was on the third day of January, 1906, by an order of this Court duly made and entered on that day appointed coreceiver for the express purpose of instituting said action in said cause No. 519-A; that the said suit in said cause No. 519-A was commenced on the eighteenth day of January, 1906, on which day Com-

plaint and Summons were filed in the above-named court; that subsequently to the judgment, decree and appeal in said cause No. 519-A to wit, on the second day of July, 1907, in the causes entitled Decker Brothers against The Berner's Bay Mining and Milling Company *et al.*, and International Trust Company against The Berner's Bay Mining and Milling Company *et al.*, numbers 603 and 536-A consolidated on the docket of this court, has decreed that at the time of the appointment of the said F. D. Nowell as receiver of the said company there was no valid, subsisting cause of action and that the said appointment of said F. D. Nowell as such receiver was void and without effect; that the United States Circuit Court of Appeals for the Ninth Circuit has affirmed this decree; that the parties plaintiff in said cause No. 519-A were designated as the receivers of the property of the said Berner's Bay Mining and Milling Company; that the Bill of Complaint in said cause No. 519-A was sworn to by the said W. B. Hoggatt, coreceiver of the said company; that the said F. D. Nowell, as such receiver of the said company had refused [162] to swear to the said Bill of Complaint for the reason that he knew of no facts or of any evidence that would justify him in swearing to the truth of the allegations contained in the said Bill of Complaint; that at the time of the commencement of said action in said cause No. 519-A there was no legally appointed receiver or receivers of the said company; that at the time said action was brought in this court there was not in contemplation of law any such parties plaintiff in existence

as the receivers of the property of the said Berner's Bay Mining and Milling Company; that the said Frederick D. Nowell and W. B. Hoggatt had no interest whatever in the said Berner's Bay Mining and Milling Company or in the result of said suit; that the said suit No. 519-A was not brought in the name of the said Berner's Bay Mining and Milling Company; that the said cause No. 519-A was commenced by receivers as parties plaintiffs whose appointments were void and illegal; that the decree in said cause No. 519-A is void for an absolute want of jurisdiction, owing to an absolute want of jurisdiction to appoint said receivers and therefore owing to an absolute want of parties to bring said action; that the commencement of said suit was void and a nullity; that the defendants in said cause No. 519-A were never properly brought into or before this court; that the enforcement of the decree in said cause No. 519-A would result and has resulted in depriving these plaintiffs of their property without due process of law in contravention of the rights guaranteed to them under the Fourteenth Amendment of the Constitution of the United States of America.

XXVII.

And, more specifically, and to the end that all and singular the foregoing allegations be made definite as to the main facts upon which is based their rights to review and have annulled and [163] set aside the decree in said cause No. 519-A, and to have relief in equity, these plaintiffs further allege and show the Court and aver the truth to be:

That the alleged discussion between, and plans considered by, said T. S. Nowell and said intervenor as to increasing the capital stock and mortgage bonds of said Berner's Bay Mining and Milling Company and the purchase of new mining claims by said company, never resulted in any completed agreement for the sale or conveyance of said "Johnson Group" to the said Berner's Bay Mining and Milling Company;

That the alleged call for said meeting of June 24, 1896, was never issued, but the call signed and issued was like the call recorded in the records of the said company;

That time was pressing and the call for the meeting of June 24, 1896, was issued and sent out before the final decision as to what properties should be purchased, and the "Johnson Group" and all other properties named in the call were so named to enable the meeting to vote to buy such of them as should be agreed on after the call and before the meeting;

That it appeared that the said "Johnson Group" could not be obtained without a large money payment, and all parties agreed shortly before meeting that the meeting for prudential reasons should not vote to buy the "Johnson Group";

That the counsel for the said company, supposing all the properties named in the call were to be bought, drafted a day or two previously, an offer to the said meeting to be written out and signed by T. S. Nowell, and was thereupon informed that the said "Johnson Group" were not to be included, and

therefore changed and interlined the paper in pencil and in ink so as to make it exclude the said "Johnson Group" as he understood the parties had agreed; that said offer was then signed by T. S. Nowell and said paper, or a typewritten copy of it signed by said Nowell, [164] was presented to the meeting of June 24, 1896, and unanimously accepted and no other offer was made to such meeting;

That said Johnson properties were not offered for sale to said Berner's Bay Mining and Milling Company at its said meeting of June 24, 1896, or at any time or at any meeting; that said B. B. M. & M. Co., never received an offer of said Johnson properties for its acceptance and never accepted such offer; that a majority of all holders of said company's stock over and above the few shares of said intervenor were present at said meeting of June 24, 1896, in person or by proxies and voted to buy the last twelve of the properties named in said call; none of which were Johnson properties; and none of said majority have ever objected to said action of said meeting;

That the contract alleged in said cause No. 519-A and found as a fact by the said Court as resulting between T. S. Nowell and said company from such an offer and such an acceptance, *never was so entered into, and never had any existence whatever;*

That true records of said meeting and its doings, of June 24, 1896, were made as written in said company's record books, and signed immediately after the meeting, and were never, fraudulently or otherwise, altered or changed in any respect or as to any matter;

That the decree in said cause No. 519-A was based on a contract and an alteration or falsification of records, neither of which in fact ever existed or occurred; however much the testimony before the court may have suggested, or tended towards proving such contract or alteration of records;

That the said decree, in effect and fact has transferred the said "Johnson Group" to parties who never had any true legal or equitable right whatever to title in, or possession of, the same; [165]

And these several allegations and the facts therein stated these plaintiffs offer to prove by evidence not before said United States District Court in case No. 519-A, much of which is newly discovered and was previously undiscoverable, and all of which is most material, and absolutely conclusive of the truth of the above allegations; and without such proof on the review and rehearing herein prayed, these plaintiffs show that said decree will simply result in taking away one party's mining claims and giving them to another party wholly without any consideration or right in law or equity to own or possess it; and, also, in so doing upon the untrue supposition that the one party committed a fraud upon the other party; thus depriving without cause a party of his property, and also of his good name;

That complainant and intervenor in case No. 519-A had personal knowledge and full opportunity for personal knowledge of all and singular the facts alleged in the foregoing allegations; that they brought said bill and petition of intervention on mere allegations of "information and belief"; and

that they falsely alleged that they were either so “informed” or “believed” said allegations; that said allegations when first read were so vague as to lull the vigilance of the defendant’s counsel and not show him the need of a demurrer; that the plaintiffs’ and intervenor’s evidence was also vague and lacking in definiteness; that the conclusions argued for by plaintiffs and intervenor took defendants by surprise, after it was too late to call the recording clerks of said company; and that by means of their false allegations, their indistinct setting forth of their case, vague evidence as to veiled conclusions of fact, unsound and specious arguments to said conclusions, unexpected and unlooked for by defendants, said plaintiffs and intervenor procured an erroneous opinion and an untrue and unjust and illegal decree in said case No. 519-A; [166]

That the fraudulent imposition upon said Court, the legal wrong inherent in the execution of its said decree, and the wrong and injury to these plaintiffs are capable of full, direct and perfect proof as follows:

By the said letters and documents first discovered, and only discoverable, as herein before set forth;

By the proxies used at said June 24th meeting;

By testimony from said T. S. Nowell now, but not previously, possible by aid of said letters and documents;

By the testimony of the clerk and deputy clerk of said Berner’s Bay Mining and Milling Company as to the facts as to said records of said June 24th meeting; the accidental or mistaken omission to take

which testimony in said cause No. 519-A, occasioned as herein stated, should not deprive the Court of the right and opportunity to revise and reverse its said decree, if found to be erroneous as heretofore alleged;

By the evidently unaltered records of the company *in connection with* the testimony of said clerks thereof that the facts at said meeting were as then and there therein written and signed;

By a copy of the true and only issued call for said June 24th, 1896, meeting, attested by its assistant clerk—and exactly like the call recorded in said records and discovered since said opinion;

By the depositions *in perpetuam* taken by these plaintiffs of said intervenor, Henry Endicott and William Endicott under an order of said United States District Court, entered June 20th, 1910, and the facts thereby and therein shown;

And, finally, by the necessary legal conclusion from two of the foregoing facts, viz.: *That there was no contract concerning* [167] the said “Johnson Group” between said Berner’s Bay Mining and Milling Company and said T. S. Nowell, and that *said corporate records truly state the entire proceedings* at its said June 24th meeting.

And these plaintiffs further show that by reason of said acts and doings and omissions of said plaintiffs and intervenor in case No. 519-A, a gross imposition has been perpetrated upon said Court, and that by force of its said opinion and decree so obtained a great wrong and injury, in property and in name and reputation has been perpetrated upon

these plaintiffs, entitling them to a review of said case No. 519-A, and the decree therein, and to such relief in equity as to the Court shall thereupon seem meet, and finally that the trial court was without jurisdiction to hear and determine said cause No. 519-A, and the decree should be vacated and adjudged a nullity.

XXVIII.

These plaintiffs further allege and show the Court and aver the truth to be that by means of the said fraudulent conspiracy aforesaid and the said fraudulent suit, and by means of the perjured testimony given in support thereof as aforesaid, and by means of the wrongful and fraudulent possession obtained as aforesaid of the books, papers, documents and said letter-press copy-books as hereinbefore set out by the said conspirators, and by means of the wrongful and fraudulent concealment and suppression as aforesaid of said books, papers, documents, and said letter-press copy-books hereinbefore alleged and set out, and by means of the wrongful and fraudulent suppression of the truth and real merits of the controversy in said cause No. 519-A, and by means of the wrongful and fraudulent production of false evidence during the trial of said cause No. 519-A and by means of the wrongful and fraudulent concealment and suppression of the truth from the knowledge of these plaintiffs and of the [163] court as hereinbefore alleged and set out, and by means of the preventing the said Thomas S. Nowell from making the meritorious and adequate defence in in said cause No. 519-A, which defence he had and

which he was in justice entitled to make, the said defendants herein intended to deceive and did deceive this court into making the findings of fact hereinbefore set out and the said decree, and that but for said fraud, concealment, deception, and perjury said court would not have been induced so to find and decree. That said findings of fact are in truth false and the said decree is supported solely by said fraudulent and wrongful concealment and suppression of material evidence, and of the truth and by said fraudulent and perjured testimony, and that by means of the said wrongful and fraudulent concealment and suppression of material evidence and of the truth and by means of said conspiracy, fraud, deception, concealment and perjury, and in consequence thereof, the truth was successfully concealed from all knowledge of the trial court with the result that *there was no adversary trial* of the said cause No. 519-A on the merits; and by means of said conspiracy, fraud, concealment, and perjury, these plaintiffs have been cheated, swindled, and robbed of their title to said "Johnson Group" of claims, and of their good names. That long after the abandonment of any intention on the part of the directors or officers of the said Berner's Bay Mining and Milling Company to purchase the said "Johnson Group," to wit: in the year 1898, these plaintiffs completed the payment of the purchase money of twenty-five thousand dollars (\$25,000) for the said "Johnson Group," and in the month of September of said year last aforesaid obtained a deed thereto from the original owners and holders of said

property, and thereafter obtained an United States patent thereto and paid the [169] Government price therefor to the United States, all of which was done with the full knowledge and consent of the said Hackett, the Endicotts, and S. W. Fairchild, who among said conspirators known to the plaintiffs, at that time had any interest in the said Berner's Bay Mining and Milling Company, and the said defendants have at all times until the formation of the conspiracy aforesaid acquiesced in, admitted, and acknowledged the legal and beneficial ownership of the said "Johnson Group" by these plaintiffs.

And these plaintiffs further allege and show the Court that they are remediless in the premises at and by the strict rule of the common law and are only relievable in a court of equity, where matters of this kind are properly cognizable and reviewable.

That affidavit of George M. Nowell, dated at Boston, Massachusetts, the twenty-fourth day of January, nineteen hundred and eleven, and the exhibits thereto attached are hereby referred to and made a part of the within Amended Bill of Complaint, to which said affidavit is attached as Plaintiffs' Exhibit "A" a copy of a letter written by the said William Endicott to the said Thomas S. Nowell, dated Boston, September 13, 1900; as Plaintiffs' Exhibit "B" a copy of the so-called Mines Securities Corporation Contract; as Plaintiffs' Exhibit "C" a copy of the Memorandum Agreement dated February 26, 1903; as Plaintiffs' Exhibit "D" a copy of a letter written by the said William Endicott to the said Thomas S. Nowell, dated Pride's Crossing,

Mass., July 18, 1905; as Plaintiffs' Exhibit "E" a copy of the motion to insert in the record the affidavit of William M. Payson; as Plaintiffs' Exhibit "F," a copy of the Petition Relating to Decree and Mandate; as Plaintiffs' Exhibit "G" a copy [170] of the Petition to open up decree for fraud of the parties in procuring the same; and as Plaintiffs' Exhibit "H" a copy of motion for further stay of mandate, and to which said affidavit and said eight exhibits reference is hereto made without repeating the same, and made a part of this Bill of Complaint.

Wherefore plaintiffs pray in consideration of the premises that said decree in said cause numbered 519-A hereinbefore set out be annulled, set aside, and for naught held; that the plaintiff, the Alaska Nowell Gold Mining Company, be decreed to be the owner in fee simple of the said "Johnson Group" of mines; that the said defendant, the said International Trust Company, a corporation, be decreed to execute to the said Alaska Nowell Gold Mining Company, a corporation, a good and sufficient deed of conveyance conveying the legal title to the said three mining lode claims known as the Northern Light, or Johnson, the Northern Light Extension No. 1, or Emma, and the Northern Light Extension No. 2, referred to and described herein as the said "Johnson Group," and deliver said deed to the said Alaska Nowell Gold Mining Company within such time as this Court shall direct by its decree herein, or in case the said defendant, the International Trust Company, fails so to execute and deliver the said deed within the time so limited by the decree

of this court, then that a Master be appointed by this Court, upon application thereto in that behalf, to execute and deliver such deed for the use and benefit of said corporation, the said Alaska Nowell Gold Mining Company; that the said International Trust Company and the other defendants in this cause, and each of them, be forever restrained and enjoined from setting up or claiming any estate, right, title or interest in or to the said three mining lode claims or Johnson Group; that the plaintiffs have and recover of and from the defendants, jointly or severally, their costs in this behalf incurred; and that the plaintiffs have such other and [171] further general relief as upon a hearing hereof they may show themselves entitled to receive, or as the nature of the circumstances of the case may require, and may seem proper and just to the Court.

GEORGE M. NOWELL,

Attorneys for Plaintiff.

United States of America,
District of Alaska,—ss.

Willis E. Nowell, being first duly sworn, on oath, deposes and says: I am one of the plaintiffs in the above and foregoing Third Amended Bill of Complaint; I have read the above and foregoing Third Amended Bill of Complaint, know the contents thereof and the same is true as I verily believe.

WILLIS E. NOWELL,

Subscribed and sworn to before me, this sixth day of February, 1911.

[Notarial Seal]

JOHN G. HEID,

Notary Public in and for the District of Alaska.

[172]

In the United States District Court for Alaska, Division Number One, at Juneau.

No. 717-A.

THOMAS S. NOWELL, WILLIS E. NOWELL,
THE NOWELL MINING AND MILLING
COMPANY, a Corporation, and THE
ALASKA NOWELL GOLD MINING COM-
PANY, a Corporation,

Plaintiffs,

vs.

INTERNATIONAL TRUST COMPANY, a Cor-
poration, HENRY ENDICOTT, WILLIAM
ENDICOTT, WALLACE HACKETT, C. R.
CORNING, R. McM. GILLESPIE, and S.
W. FAIRCHILD,

Defendants.

**Affidavit of George M. Nowell Attached to Third
Amended Bill of Complaint.**

George M. Nowell, being first duly sworn, deposes and says: That I am attorney for the plaintiffs in the above-entitled cause; that I am a son of Thomas S. Nowell and a brother of Willis E. Nowell, two of the plaintiffs in the above-entitled cause; that I am the identical George M. Nowell who was one of the attorneys representing the above-named plaintiffs as the appellants in the appeal of Thomas S.

Nowell, Willis E. Nowell, the Nowell Mining and Milling Company, a corporation, and the Alaska Nowell Gold Mining Company, a corporation, vs. John C. McBride, as receiver of the Berner's Bay Mining and Milling Company and Henry Endicott, Intervenor, numbered 1436 on the docket of the United States Circuit Court of Appeals for the Ninth Circuit.

That the hereto attached Plaintiffs' Exhibit "A" is a true copy of a letter written by William Endicott, one of the defendants in the above-entitled cause, to the said Thomas S. Nowell, dated Boston, September 13, 1900.

That the Plaintiffs' Exhibit "B" hereto attached is a copy [173] of the so-called Mine Securities Corporation contract, which is to be found at pages 581 to 596, inclusive, of the transcript of record of the appeal of Nowell et al. vs. International Trust Co. et al., numbered 1641 on the docket of the United States Circuit Court of Appeals for the Ninth Circuit.

That Plaintiffs' Exhibit "C" hereto attached is a copy of the memorandum of agreement dated February 26, 1903, which is to be found at pages 616 to 623, inclusive, of the transcript of record of the last named appeal.

That the hereto attached Plaintiffs' Exhibit "D" is a true copy of a letter written by the said William Endicott to the said Thomas S. Nowell, dated Pride's Crossing, Mass., July 18, 1905.

That I prepared the Motion for the Insertion in the Record of the Affidavit of William M. Payson

and presented the same to the said United States Circuit Court of Appeals on May 27, 1907, immediately before the argument on that day of the said appeal of Nowell et al. vs. McBride et al., a copy of which said Motion is hereto attached and marked Exhibit "E."

That I prepared a Petition Relating to Decree and Mandate which was filed in said United States Circuit Court of Appeals in said appeal Nowell vs. McBride, on or about August 3, 1908, which said petition was taken under advisement by the said United States Circuit Court of Appeals and denied on November 2, 1908, a copy of which said Petition Relating to Decree and Mandate is hereto attached and marked Plaintiffs' Exhibit "F."

That I prepared the Petition to Open Up Decree for Fraud of the Parties in procuring the same on November 6, 1908, and submitted the same on November 7, 1908, to the said United States Circuit Court of Appeals, in said appeal, Nowell vs. [174] McBride, a copy of which said Petition to Open Up Decree for Fraud of the Parties in procuring the same is hereto attached and marked Plaintiffs' Exhibit "G."

That subsequently thereto I prepared a Motion for Further Stay of Mandate in said appeal Nowell vs. McBride, dated at Boston, Mass., November 21, 1908, which was also submitted to the said United States Circuit Court of Appeals, a copy of which said Motion for Further Stay of Mandate is hereto attached and marked Plaintiffs' Exhibit "H."

That the said above-named Plaintiffs' Exhibits

“A,” “B,” “C,” “D,” “E,” “F,” “G,” and “H” are true, full and correct copies of the said letters, motions and petitions referred to and mentioned in paragraphs XXI and XXV of the foregoing Third Amended Bill of Complaint in the above-entitled cause, and to which said Third Amended Bill of Complaint this affidavit and the said eight (8) exhibits are attached.

And further deponent saith not.

GEORGE M. NOWELL.

Subscribed and sworn to before me this 24th day of January, 1911.

[Notarial Seal]

WILLIAM NELSON,

Notary Public.

My commission expires June 10, 1915. [175]

Plaintiffs' Exhibit “A” [to Affidavit of George M. Nowell].

Boston, Sept. 13, 1900.

Dear Sir:

I have sent three letters for you to Dexter, Horton & Co., Seattle. Your letter to W. Hackett proposing that we should place some two years receiver's Certificates have been sent to me. It would be as impossible for me to do it as it would for me to move Bunker Hill monument to this City. We have had several conferences with the N. E. Ex. Co. people with a good deal of disappointment. They know the situation thoroughly and they will not throw away the chance of getting a bargain. They say that there is no development to justify their paying much money for it, that they never buy prospects but only developed mines, that if they be-

gin it will involve a very large expenditure to equip for a big plant and that there is no show for a profit unless it was operated on a large scale, &c., &c. I was afraid yesterday that they would decline altogether, but Mr. Agassiz is to be in town on Friday and Col. Livermore will talk it over with him and see if he is willing to go in on the basis of putting up cash to pay the receiver's certificates and the Alaska debts not to exceed \$150,000 and to develop the property, including the Johnson, and to have 51% of the New Co. The 49% to be made sufficiently large to fund the bonds and floating debt and to furnish \$500,000 in shares for the Johnson mines. [176]

So that it comes down to this, whether we shall let the whole thing go, or be content with half of the property in the new Company. I have so much faith in the values that I feel very strongly that if the prospect is so good as to induce them to put in a plant to handle 500 to 1000 tons per day, as recommended by Mr. Furman, in a few years the Creditors of the B. B. Co. might get their money back if they were able to hold on to the shares. If we hear from you that you will put in the Johnson we shall not hesitate to trade. It is that or nothing, and half a loaf is certainly better than no bread. I hope to hear that you approve. If you have not already done so please telegraph the exact condition of the Amer. Co. Water Power, whether there is any lease and upon what terms, or whether it is free and clear. Are the Alaska debts incurred prior to the receivership a prior lien to the bonds? If not I think that you will not be able to pay interest upon that part of the debt, as you must make the whole

less than 150,000 and will need some money for expenses. You give the amounts as \$90,000 before the receiver and \$46,000 later including the certificates. I think that these amounts should be reversed as you wrote that there were \$50,000 Certificates. We are anxious to hear from you as time is important. It will probably take more than a month to fix things up but I suppose that Judge Brown will wait if he knows that a Sale has been made.

Yours truly,

W. N. [177]

Plaintiffs' Exhibit "B" [to Affidavit of George M. Nowell].

AGREEMENT made this 6th day of February, one thousand nine hundred and two, in the City of New York, between the Northern Belle Gold Mining Company, and Thomas S. Nowell, of Juneau, Alaska, individually, parties of the first part, The Mine Securities Corporation, party of the second part, both of said corporations being duly organized and existing under and by virtue of the laws of the State of Maine, the majority of the holders of the Mortgage Bonds of the Berner's Bay Mining and Milling Company, secured by deed of trust to the International Trust Company, of Boston, Mass., dated July 1st, 1896, parties of the third part, and the Seward Gold Mining Company, the Ophir Gold Mining Company and the Nowell Mining and Milling Company, the owners of what is known as the Johnson properties located near the Northern Belle Gold Mining Company's property in Alaska Territory, so far as their interests are herein affected, parties of the fourth part:

WHEREAS, The Parties of the first part are owners of the properties, plant, assets, machinery, tools, rights and interests hereinafter mentioned, and are desirous of selling the same, and

WHEREAS, the said properties, plant, machinery, tools, assets, rights and interests are subject to the mortgage above mentioned, and the parties of the third part have signified in writing to the said Thomas S. Nowell their willingness to release on certain terms and conditions the same from the mortgage lien, or to ratify any agreement made for the purpose of providing for the discharge of the Receiver now in possession and for securing the payment of these bonds without foreclosure, and

WHEREAS, the parties of the fourth part are ready to facilitate the purposes of this agreement by becoming a party hereto, and [178]

WHEREAS, the party of the second part is willing at its own expense to send a representative to examine and report upon the properties aforesaid not later than June next, and to enter into the following agreement, by reason of the statements and representations of the said Thomas S. Nowell.

NOW, THEREFORE, THIS AGREEMENT WITNESSETH:

FIRST. That the party of the second part in consideration of the premises and of the promises and agreements hereinafter set forth, will as soon as this instrument has been properly executed by the parties hereto, or by their duly constituted attorneys, conditionally subscribe or furnish satisfactory subscribers for Twenty-five Thousand Dollars (\$25,-

000) par value of duly authorized certificates, to be issued as directed by Frederick D. Nowell, the duly appointed Receiver of the Berner's Bay Mining and Milling Company, which company included among its properties at the date of the aforesaid deed of trust the properties of the parties of the first part, and upon the execution of this instrument by all of the parties hereto, the party of the second part will place to the credit of said Receiver in the Puget Sound National Bank, Seattle, Washington, the sum of Five Thousand Dollars (\$5,000), for which they are to receive Five Thousand Dollars (\$5,000) of Receiver's Certificates issued as they may direct, bearing 8% interest from the date of deposit to the maturity of said certificates and their payment, as provided by the order and decree of the United States District Court for the District of Alaska, Division No. 1, dated April 16th, 1901. It is understood and agreed that this Five Thousand Dollars (\$5,000) is to be used and applied by the Receiver, Frederick D. Nowell, and his successor, for no other purpose than in extending the Kensington tunnel to the Eureka Lode, hereinafter mentioned, that the work shall be continuous, and that if any further sum is needed for continuing this tunnel until the representative of the party of the second [179] part makes his examination of the properties it shall be provided for by the party of the second part on three days sight draft with the Receiver with a Certificate or Certificates accompanying such draft, but such further sum shall not exceed in amount Five Thousand Dollars (\$5,000) until such examina-

tion is made and its result presented to and acted upon by the party of the second part.

SECOND. The party of the second part agrees upon receipt of the report of its representative to act thereon without delay, and decide whether or not to confirm its subscription for the balance of the Twenty-five Thousand Dollars (\$25,000) Certificates, or to cancel the same, it being understood and agreed that the party of the second part has this option and is to exercise it at this time when acting upon the report of its representative, and should it decide to cancel the balance of its Twenty-five Thousand Dollars (\$25,000) subscription, that the party of the first part shall have the benefit of work already done, and that no party to this agreement shall have any claim against another.

THIRD. Should the party of the second part decide to confirm its subscription for the balance of the Twenty-five Thousand Dollars (\$25,000) of the Receiver's Certificates, it shall forthwith notify the party of the first part in writing, addressed to the care of Henry Endicott, 176 Federal Street, Boston, Mass., of its decision, and shall take up and pay for the same as often as money is required for such development work as it may deem it expedient to do, and for the extension of the Kensington tunnel. All work after said confirmation shall be done under the advice and supervision of the engineer of the party of the second part, subject, however to the authority of said Court, while the property is in the Receiver's hands. The cost of running the Kensington tunnel to its present extent, viz., six hundred and twenty-five feet, having been paid by the Nowell Mining

and Milling Company, it is agreed that the expense of the next six hundred and twenty-five feet, if run, shall be borne by the party of the second part, and that the cost of all further work and equipment in said tunnel through the Northern [180] Belle Company's ground which may be done and required shall be shared equally between the Nowell Mining and Milling Company and the party of the second part, but that the entire cost of any extension beyond the ground of the Northern Belle Company's properties is to be borne by the said Nowell Mining and Milling Company.

It is hereby expressly understood and agreed, that upon the party of the second part confirming its subscription as above, it will incorporate a company to be known by a name it may decide upon, a non-assessable common stock, for the purpose, among other purposes, of taking over properties, rights, water rights, flumes, interests, and privileges, and other and divers property of whatever description belonging to the Northern Belle Gold Mining Company, or granted to or exercised by them, together with any interests in railroads, wharf, terminal facilities, and all else to which it may be entitled, and that all documents and papers connected with its incorporation and organization shall be deposited in escrow with Thomas S. Nowell, Thomas J. Hurley and one other to be by them selected, as trustees, together with a copy of this agreement, and a letter of instructions to carry out such provisions thereof as will rest with them to perform.

The expense of organizing said company, issuing

its stock, providing the required revenue stamps, and all else incident and attendant thereto, shall be borne in the following proportions, viz.: Forty per cent (40%) by the party of the first part and sixty per cent (60%) by the party of the second part. Upon the incorporation of the new company as aforesaid the party of the first part shall procure properly authorized and duly executed deeds, releases, bills of sale, assignments, agreements, stipulations, and all [181] other instruments necessary or proper for the conveying and assuring to the new company a clear and satisfactory title to all the properties, assets, rights, water rights, flumes, interest and privileges and other and divers property of whatever description belonging or granted to or exercised by the Northern Belle Gold Mining Company, reserving, however, the rights of way and terminal facilities given by the stockholders of the Northern Belle Gold Mining Company to the owners of what is known as the Johnson Mines, since organized and incorporated under the name of Nowell Mining and Milling Company; and all conveyances and instruments usually recorded shall have certificates affixed in such form as will entitle them to be recorded in the usual and proper offices, and shall contain the usual covenants that properties conveyed are free from incumbrances except as herein mentioned, and all such instruments shall be placed in escrow with the International Trust Company, of Boston, Mass., subject to the provisions of this agreement. And that concurrently with the formation of the New Company, and the deposit of deeds and other instruments as above provided, the

parties of the third part and the holders of the mortgage bonds aforesaid will deposit at least a majority of the mortgage bonds in said Trust Company, and give such Trust Company full authority to proceed to foreclose the mortgage securing said bonds, should it be found necessary so to do in order to perfect the titles of the Northern Belle Gold Mining properties, and they will deposit in escrow their agreement to carry out their part of this agreement immediately, or as soon as possible after its execution.

FOURTH. In consideration of the mutual covenants and agreements set forth below, it is hereby agreed that the first and second parties hereto shall be entitled to and shall receive the capital stock of said [182] Company when issued as hereinafter provided in proportion as follows, that is: two-fifths or Two Million Dollars (\$2,000,000) thereof at par to the former, and three-fifths or Three Million Dollars (\$3,000,000) thereof at par to the latter.

The mutual covenants and agreements are:

I. That on or before December 31st, 1902, the party of the second part shall provide one hundred and ninety thousand dollars (\$190,000) to retire to the Receiver's certificates authorized by order of Court dated Oct. 29th, 1901, and accrued interest thereon at the rate of 8% per annum from their date of issue.

II. That on or before December 31st, 1902, the party of the second part will pay into the International Trust Company of Boston, Mass., One Hundred and Seventy-five Thousand Dollars (\$175,000) as a system on the mortgage bonds of said Berner's

Bay Mining and Milling Company and will provide for the treasury of the new Company the sum of Two Hundred Thousand Dollars (\$200,000).

III. That on or before June 30th, 1903, the party of the second part will pay into the International Trust Company of Boston, Mass., an additional one Hundred and Seventy-five Thousand Dollars (\$175,000), as a payment on the mortgage bonds of said Berner's Bay Mining and Milling Company, being the full amount agreed to be paid by the party of the second part, viz.: Three Hundred and Fifty Thousand Dollars (\$350,000) to the holders of said mortgage bonds, and will provide for the treasury of the new Company an additional sum of Two Hundred Thousand Dollars (\$200,000).

IV. It is understood and agreed that as often as the payments provided in sections I, II, and III, or any part thereof, are made, the Directors of the New Company will authorize the issue, and will issue, a *pro rata* of shares out of the three-fifths or Three Million Dollars [183] (\$3,000,000) of its capital stock, to which the party of the second part is entitled, as such party may direct, and certificates therefor shall be delivered by the said Trustees. The two-fifths or Two Million Dollars (\$2,000,000) of the New Company's capital stock, to which the party of the first part may become entitled, as payments are made as provided in sections I, II, III, above, shall be authorized and issued, and shall be held by said Trustees subject to the order of Thomas S. Nowell, one of the parties of the first part.

V. It is understood and agreed that the net rev-

venues realized from the extraction, treatments, sale, and disposition of ore, from operating the mines, from the present Forty Stamp-mill and any addition thereto and from any other source by the party of the second part, prior to the payment of the One Hundred and Ninety Thousand Dollars (\$190,000) of Receiver's Certificates shall be applied to their payment with interest thereon due, and as soon as the required amount is paid into court for the liquidation of the said certificates proper steps will be taken without delay to secure the closing of the Receiver's accounts and his discharge and the placing of the management of the properties herein mentioned in the hands of the parties of the second part.

VI. After the payment of said certificates and the discharge of the Receiver, forty per cent (40%) of said net profits stated above, shall be ascertained and paid to the parties of the parties of the first part in stock of the new company issued as they may direct at par from the sixty per cent (60%) of its capital stock, to which the party of the second part is entitled under this agreement.

VII. It is agreed that the parties to this agreement shall not, nor shall either of them, do or suffer anything to be done which will impair or affect or cloud or place a lien upon the properties or any of them mentioned herein, or the title or titles thereto, and that failure of the [184] parties of the second part to meet their obligation as herein provided or agreed upon may be regarded as a forfeiture of all their rights and privileges which they may have not acquired or become entitled to at the time of such failure.

VIII. After the aforesaid properties have passed under the management of the party of the second part, and before they have been transferred to the New Company above mentioned, such portion thereof as is insurable shall be kept fully insured, and premiums thereon be charged against operating expenses, and in determining "net revenues" these premiums, and all sums necessarily expended for operating the properties, extracting, treating, selling and disposing of ore, together with salaries, wages, materials, repairs and additions to buildings, machinery, equipment, and rolling stock, transportation, freight, and fuel supplies, taxes, assessments, and traveling expenses, shall be first paid, and during this time the work shall be done in a miner-like manner, and books of account be kept which with the properties may be inspected by Thomas S. Nowell, one of the parties of the first part or upon his written order, at any reasonable time, and during this time, and until the said New Company assumes legal control of the property, the railroad, wharf, warehouse and terminal facilities shall be operated, used, and controlled, by the parties of the second part.

IX. It is contemplated at the date of this agreement by the first, second and fourth parties hereof to form a corporation to purchase the aforesaid railroad, wharf, warehouse, and terminal facilities, and pay for the same by issue from its capital stock, the said party of the first part to receive two-fifths, and the said party of the second part two-fifths, and the said party of the fourth part one-fifth for their respective rights, privileges and interest in said rail-

road, wharf, warehouse, and terminal facilities, and as further consideration for the making of this present agreement, Thomas S. Nowell, one of the parties [185] of the first part, agrees to use his best endeavors to effect the arrangements set forth in this section upon the request in writing of the parties of the second part or its duly appointed agent, and does further agree to procure for the parties of the second part or its assigns from the parties of the fourth part, an option of purchase on the Bunker Hill, Boston, and Troy locations, for One Hundred and Fifty Thousand Dollars (\$150,000) at any time before noon of June 30th, 1903.

X. The parties hereto jointly and severally agree to execute such other instruments and to do anything further which may be necessary or proper to carry out in good faith the purposes of this agreement.

XI. This agreement shall be binding upon the heirs, executors, administrators, successors and assigns of the parties hereto.

IN WITNESS WHEREOF, The Northern Belle Gold Mining Company has caused these presents to be signed by its President and its corporate seal to be affixed, and Thomas S. Nowell has hereunto set, his hand and seal; and the Mine Securities Corporation has caused these presents to be signed by its President and its corporate seal to be affixed and the parties of the third part have hereunto set their hands and seals; and the Seward Gold Mining Company, the Ophir Gold Mining Company and the Nowell Mining and Milling Company have respectively caused these presents to be signed by their respective presi-

dents, and their respective corporate seals to be affixed, the day and year first above mentioned.

[Seal of The M. S. Cor.]

Seal attested:

THE MINE SECURITIES CORPORATION,
THOS. J. HURLEY,

President.

GEO. J. SCHERMERHORN,

Treasurer.

HENRY ENDICOTT. [Seal]

WALLACE HACKETT. [Seal]

NORTHERN BELLE GOLD MINING
COMPANY,

By THOMAS S. NOWELL,

President.

THOMAS S. NOWELL. [Seal] [186]

SEWARD GOLD MINING COMPANY.

By THOMAS S. NOWELL,

President.

OPHIR GOLD MINING COMPANY.

By THOMAS S. NOWELL,

President.

NOWELL MINING AND MILLING COM-
PANY.

By THOMAS S. NOWELL,

President.

State of New York,

City and County of New York,—ss.

On the 6th day of February, one thousand nine hundred and two, before me personally came Thomas S. Nowell, to me known, who, being by me duly sworn, did depose and say that he resided in Juneau, Alaska;

that he is the President of the Northern Belle Gold Mining Company, the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of the said corporation, and that he signed his name thereto by like order.

[Notary's Seal]

NELLIE G. FOX,
Notary Public, N. Y. Co.

State of New York,

City and County of New York,—ss.

On this 6th day of February, one thousand nine hundred and two, before me personally came Thomas S. Nowell, to me known and known to be one of the persons described in and who executed the above instrument, and he acknowledged that he executed the same as his free act and deed.

[Notary's Seal]

NELLIE G. FOX,
Notary Public, N. Y. Co. [187]

State of New York,

City and County of New York,—ss.

On this 6th day of February, one thousand nine hundred and two, before me personally came Thomas J. Hurley, to me known, who being by me duly sworn, did depose and say that he resided in Brooklyn, New York; that he is President of the Mine Securities Corporation, the corporation described in and which executed the above instrument; that he knew the seal of said corporation, and that the seal affixed to said instrument was said corporate seal; that it was so affixed by order of the Board of Directors of the said

corporation, and that he signed his name thereto by the like order.

[Notary's Seal]

NELLIE G. FOX,
Notary Public, N. Y. Co.

State of New York,

City and County of New York,—ss.

On this 6th day of February, one thousand nine hundred and two, before me personally came Thomas S. Nowell, to me known, who being by me duly sworn did depose and say that he resided in Juneau, Alaska; that he is the President of the Seward Gold Mining Company, The Ophir Gold Mining Company and the Nowell Mining and Milling Company, corporations described in and which executed the above instrument; that he knew the respective seals of said corporation; that the seals to said instrument was the corporate seal for each respective corporation, and it was so affixed by order of the Board of Directors of the respective corporations, and that he signed his name thereto by like order.

[Notary's Seal]

NELLIE G. FOX,
Notary Public, N. Y. Co. [188]

We, the undersigned owners and holders of the number of bonds of the Berner's Bay Mining and Milling Company set opposite our respective names, do hereby ratify and confirm the above agreement so far as relates to said bonds, and hereby agree to deposit the same in the International Trust Company, of Boston, Mass., in accordance with the terms of the agreement.

Dated February 7th, 1902.

HENRY ENDICOTT. 260
WALLACE HACKETT. 27

I, Thomas S. Nowell, President of the several companies mentioned in the first and fourth parts of the above contract, under authority given me by the By-laws, do hereby agree to instruct the clerk of the respective companies to call a special meeting of the stockholders thereof for the purpose of ratifying and confirming the foregoing agreement.

Dated February 6th, 1902.

THOMAS S. NOWELL,
President. [189]

Plaintiffs' Exhibit "C" [to Affidavit of George M. Nowell].

Memorandum of an agreement entered into between the holders of the first mortgage bonds of the Berner's Bay Mining & Milling Company, organized under the laws of the State of Maine, herein designated as parties of the first part; and Wallace Hackett of Portsmouth, N. H., Trustee, herein designated as party of the second part; and Thomas S. Nowell, Frederick D. Nowell, and Willis E. Nowell, all of Juneau, Alaska, parties hereto of the third part.

Whereas the property of the Berner's Bay Mining & Milling Company, situated in Alaska, is subject to a mortgage, under which instrument bonds of the par value of Five Hundred Thousand (\$500,000.00) Dollars have been issued, with coupons for interest on the same attached; and whereas the interest on said bonds is in default and has remained unpaid for a series of years; and whereas the corporation of the Berner's Bay Mining & Milling Company is now in the care and custody of a receiver appointed under the United States District Court of the District of Alaska; and

whereas, under authority of said Court, said receiver has issued, from time to time, evidences of indebtedness of said corporation in the form of receiver's certificates which aggregate upwards of Two Hundred Thousand (\$200,000) Dollars; and whereas there exists certain unsecured indebtedness of said Berner's Bay Mining & Milling Company represented by notes and other memoranda; and whereas it is for the best interest of all the creditors of said company to dispose of their rights, titles and claims therein and to sell and assign their ownership thereof to outside parties for an adequate consideration; and whereas the Nowells, parties hereto of the third part have entered into negotiations with certain parties with this end in view, and in order to consummate said negotiations it is needful to have the corporation relieved from the encumbrance of the first mortgage bonds, which [190] it is proposed to do by substituting other security therefor, and in a similar manner to provide for the security and ultimate payment of the unsecured debts of said corporation:

Now, therefore, be it known that the parties hereto, in view of securing the results above set forth, hereby agree with each as follows, to wit:

First: The bondholders will deposit their bonds with Wallace Hackett of Portsmouth, N. H., who will act as trustee for the purposes hereinafter described and issue his receipts for the bonds deposited with him. The acceptance of such receipts on the part of the bondholders shall constitute the assent of said bondholders to this contract and the terms thereof.

Second: The parties hereto of the third part shall provide for the prompt payment of the receiver's cer-

tificates of indebtedness and interest thereon to the full satisfaction of the United States District Court, and shall obtain the discharge of said corporation from the custody of said court as above described.

Third: Said parties of the third part will preserve the integrity of the property. That is, they will not suffer any part of the Berner's Bay properties, or any mining claims existing thereunder, now forming portions of properties designated as the Northern Belle, the Seward and the Ophir, together with the mill, millrights, railroads, wharf properties, etc., thereto belonging, to be separated or estranged from the main body of the corporation; but all of said properties shall be preserved in their integrity, and together with the group of mines in Alaska contiguous to the said Berner's Bay property known as the Johnson group and organized into a corporation under the name of the Nowell Mining & Milling Company, which said Nowell Mining & Milling Company is the exclusive property of the parties of the third part and subject to no encumbrance, but free and clear of all indebtedness. Said parties of the third part hereby agree to add said Johnson properties above mentioned, to the properties of the [191] Berner's Bay Company, so that the same may be formed into one corporation for the purposes of selling the same to purchasers who will organize a new corporation embracing all of the properties aforesaid, and distribute the stock of the same as hereinafter set forth.

Fourth: A new corporation shall be formed and the properties above described shall be conveyed to said corporation. The capital of said corporation

may be such sum as shall be agreed upon by the parties of the third part and the parties with whom they negotiate a contract of sale of these properties.

Fifth: While it is not the purpose of this contract to bind the parties of the third part to the performance of this paragraph exactly as it is herein written—but under the necessities of the case some leeway for changes in the negotiation must necessarily be granted to said parties of the third part—still it is the intention and purpose of the parties of the third part hereto to negotiate a contract for the sale of the above properties with a syndicate of substantial worth, and to receive in payment thereof enough money to discharge the receiver's certificates and interest thereon now outstanding; also that the purchasing syndicate shall erect a mill of the capacity of one thousand (1,000) tons per day, and otherwise improve and equip the plant for successful and continuous operations at their own expense that said syndicate shall receive fifty per cent (50%) of the capital stock of the new corporation formed as aforesaid, and that the parties of the third part hereto shall receive fifty per cent (50%) thereof. Of the fifty per cent (50%) so received by the parties of the third part, one-half ($\frac{1}{2}$) thereof, or twenty-five per cent (25%), of the entire capital stock shall be placed in the hands of the party of the second part hereto as trustee, and said trustee shall hold said twenty-five per cent (25%) of the capital stock for the benefit of the creditors of said Berner's Bay Company. Said trustee shall receive all dividends [192] accruing

on said stock and shall devote the same to the payment of the indebtedness as follows:

First mortgage bonds;

\$150,000.00 payable on or before Dec. 31, 1905;

\$150,000.00 payable on or before Dec. 31, 1906;

\$200,000.00 payable on or before Dec. 31, 1907;

all accrued and other interest on said bonds to be reduced to four per cent (4%) per annum and to be paid by December 31, 1908. Furthermore, said trustee is to receive the custody of all unsecured indebtedness against said corporation and issue his receipts therefor. He is to hold said capital stock after the payments above mentioned for the further purpose of paying said unsecured indebtedness in four (4) equal payments, beginning on or before December 31, 1909, and continuing at intervals of six (6) months thereafter; interest upon said unsecured indebtedness, to be both accrued and otherwise, shall be reduced to three per cent (3%). The unsecured indebtedness shall be passed upon by a competent auditor who shall certify to the correctness of the same, and thereupon it is to be held by the trustee as aforesaid.

After all payments under this agreement have been made by the parties of the third part, said party agrees, on or before December 31, 1910, to issue to the bondholders *pro rata* to their holdings therein, ten per cent (10%) of fifty per cent (50%) of the entire capital stock. Pending the continuance of this agreement, from the date hereof to the date last above mentioned, the voting power of the stock in the hands of the trustee shall be vested in the parties of the third part. Said trustee is to hold said twenty-five

per cent (25%) of the capital stock of the new corporation as collateral security for the payment of the bonds and other indebtedness as above described. In the event of the default of such payment, he is authorized to distribute the stock as follows: .

First: To the payment of the principal of the bonds with interest [193] upon the same as above estimated, upon the following basis, i. e.: If the capital stock of the new corporation above referred to shall be Five Million (\$5,000,000.00) Dollars, then shares in the same shall be allotted at the par value in payment of said bonds and interest.

Second: The shares of said new corporation then remaining shall be applied *pro rata* to the payment of the unsecured indebtedness as the same shall appear when duly audited and the amount thereof clearly ascertained.

Third: On the payment of all the indebtedness herein provided the remaining portion of said twenty-five per cent (%) of the capital stock shall become the property of the parties of the third part, and said trustee is hereby authorized to convey the same accordingly.

If the capital stock of the new corporation shall be made to be in excess of Five Million (\$5,000,000.00) Dollars, then the shares thereof shall, in the discharge of the aforesaid indebtedness be valued at a proportionately lower price per share.

Sixth: Said trustee is hereby vested with full authority to proceed with the foreclosure of the mortgage now on said Berner's Bay properties and secured by the mortgage bonds above named, should

such step prove necessary. And, furthermore, said trustee is vested with full authority to do and perform all things necessary for the purpose of carrying out this contract so far as devolves upon him.

A part of the consideration of this contract being the conveyance of the Johnson properties, above described to the proposed purchasing syndicate therein mentioned, by the parties of the third part; and the mutual covenants and agreements hereto constituting the other considerations hereof.

In witness whereof the parties hereto have signed and sealed this contract this 26th day of February, 1903.

WALLACE HACKETT. [Seal]

THOMAS S. NOWELL. [Seal]

FREDERICK D. NOWELL. [Seal]

WILLIS E. NOWELL. [Seal]

[194]

Plaintiffs' Exhibit "D" [to Affidavit of George M. Nowell].

Prides Crossing, Mass.

July 18, 1905.

Dear Mr. Nowell,—

I received yesterday your letter of July 5th with proposal to buy the B. B. Securities, that I have deposited with the Equitable Trust Co. under the Gillespie agreement. Having entered into this agreement I cannot go back on my word even if I do make as you suggest a "total loss." I dare say that it is in your power, if you choose to do so, to bring about this result but I shall not believe that you would be willing to do it until I am compelled to. Although I have written it several times you do not seem to com-

prehend our situation. Your contract with Thane was not made until a fortnight after you had been advised by Hackett that N. Y. parties had called for the return of Certificates and bonds and that you could not carry out any bargain as you had previously been authorized to do. Before you had taken up Thane and were negotiating with others, (Tripp or some such name), you did not seem to be likely to accomplish any thing and Hackett said that parties were becoming very impatient and were continually writing to him. Gillespie appeared with a proposal that the certificate holders should take the property but we did not favor it and Hackett said that he was a large Creditor of [195] yours and his interest was that you should be made solvent and I said the same thing. G. and Corning went home and we supposed that they had given up the plan of doing anything. In the meantime your letters did not afford much ground for hope that you could make any favorable terms and each one insisted upon money being raised here, and perhaps from Gillespie, as absolutely necessary. When the demand was made for the return of the bonds and Certificates and time was rapidly running off and it seemed necessary that something be done at once there seemed nothing so advisable as to take up with Gillespie's plan which we did. If you had made your bargain with Thane a couple of months sooner I have no doubt that Gillespie and all others would have accepted it. When you did make it it was too late. We could not back out from an agreement fully entered into.

I think it is only fair and really for your interest to

join Gillespie and help carry it out. My brother says that you and your Sons together would receive just about the same as my brother and I will in G's scheme. You and your sons has put in a good deal of time and much worry. My brother and I have put in a great deal of Cash and much worry. We think that our Cash is Certainly the equivalent of your time.

If the property is what you believe it to be what you can receive for the Johnson will be quite a fortune in itself. As to your debts, it may relieve you somewhat if I make the following proposition. From a rough calculation I find that your personal indebtedness to me for direct obligations and guarantees is \$538,633.18 and for interest \$286,877.49 making \$825,510.67 outside of B. B. endorsements [196] If you will cordially accept Gillespie's scheme and help it along I will take what I can get from B. B. and from the bonds of the Nowell Co. and release you from all claims for which I have other Security or none at all. This will relieve you of a very large share of your load. Perhaps Hackett may be willing to do the same though I have never said a word to him about it. There is another matter for me to speak of. You will remember that, a long time ago, Fred was in great trouble about the issue of Certificates. I do not remember what the trouble was but it was serious; I think that he had issued more than he had any right to do. At any rate, you wished me to return to you \$12,500 which I did receiving nothing for them but trusting entirely to your honor to make good. Fred seems to have quite an amount

of Certificates and I think that my \$12,500 should be returned to me. Since you have sent your letters to No. 88 Summer St. they have wandered about a great deal as the number of our store is No. 33. Several of them have been put in Kidder, Peabody & Co.'s post office box. Please direct to Prides Crossing or to No. 32 Beacon St., and they will reach me safely. I am trying to sell my place in Beverly and it may be my last Summer here.

Yours truly

W. ENDICOTT. [197]

[Endorsed]: "Original No. 717-A. In the United States District Court for Alaska, Division No. One, at Juneau. Thomas S. Nowell et al., Plaintiffs, vs. John C. McBride et al., Defendants. Third Amended Bill of Complaint. Filed Feb. 6, 1911. H. Shattuck, Clerk. By H. Malone, Deputy. George M. Nowell, J. H. Cobb, Attorneys for Plaintiffs." "A copy of the within Third Amended Bill of Complaint is hereby admitted this 6th day of February, 1911. Lewis P. Shackleford, Shackleford & Bayless, Attorneys for the Defendants." [198]

Plaintiffs' Exhibit "E" [to Affidavit of George M. Nowell].

United States Circuit Court of Appeals, for the Ninth Circuit.

No. 1436.

THOMAS S. NOWELL, WILLIS E. NOWELL,
THE NOWELL MINING AND MILLING
COMPANY (a Corporation), and THE
ALASKA NOWELL GOLD MINING COM-
PANY (a Corporation),

Appellants,

vs.

JOHN C. McBRIDE, as Receiver of THE
BERNER'S BAY MINING AND MILL-
ING COMPANY, and HENRY ENDICOTT,
Intervener,

Appellees.

**Motion for Insertion in Record of Affidavit of
William M. Payson [in C. C. A. No. 1436].**

Now come the appellants above named by their attorney, George M. Nowell, and move the Court for an order requiring the insertion in the record herein of the affidavit of William M. Payson, dated May 1st, 1907, making oath to the fact that the records of the Berner's Bay Mining and Milling Company and specifically the minutes of the stockholders' meeting of June 24, 1896, are a true record of the transactions done at that said meeting and that they have never been altered or changed since the date of said stockholders' meeting, for the following reasons, to wit:

1.

That the undersigned, attorney for Willis E. Nowell, one of the appellants, was not identified with, or employed, in the hearing of this appeal, No. 1436 in this court, until about the latter part of February, or the beginning of March, 1907.

2.

That up to and until about the beginning of March, the only connection [199] said George M. Nowell has had therewith was to get copies of certain writings at the request of his father, Thomas S. Nowell, one of the appellants herein.

3.

That he talked with said William M. Payson with reference to taking his deposition, and that the impression he received from this conversation with said William M. Payson was to the effect that said Payson knew nothing about the negotiations leading up to the stockholders' meeting of June 24, 1896, and therefore could not testify thereto.

4.

That after said George M. Nowell's employment in this case as counsel, and after having studied the pleadings and familiarized himself with the allegations and precise points in issue, he went again to said Payson for the purpose of securing his testimony, if possible, on the single point of the fraudulent alteration of the records, whereupon said Payson was most positive in his assertion that the record of the minutes of that meeting was absolutely correct and that he was willing and anxious to take oath to that fact.

5.

Upon learning this fact, said George M. Nowell,

acting as counsel, at once communicated with the appellants at Juneau, Alaska, advising them of the discovery of this fact and requested that their local attorneys at Juneau move the District Court there to allow this affidavit of said Payson to be admitted in evidence and made a part of the record in this appeal.

6.

That said local attorneys at Juneau refused to make the motion as requested saying that it would not be admitted by the Court. Nevertheless, not being himself satisfied with this their personal conclusion of law, said George M. Nowell, required said Payson to execute the affidavit and attach thereto photographic copies of the pages of the Berner's Bay Company record-book upon which are recorded the acts of the stockholders at the meeting of June 24, 1896, which have particular reference [200] to the transaction involved in this present appeal, which said affidavit as above described was forwarded by the said George M. Nowell to Juneau, to be offered there to the United States District Court for admission in evidence in this cause, upon the receipt of which said affidavit said local attorneys still refused to offer it in evidence in the belief that it would not be admitted, of which second refusal said George M. Nowell was apprised by telegraph less than two hours before his departure from Boston on May 18th last for San Francisco to appear as counsel in this said appeal.

7.

That said George M. Nowell, acting in good faith and in the exercise of due diligence, has taken the proper and necessary steps herein to secure the ad-

mission of this said affidavit in evidence by the United States District Court at Juneau, and in view of the fact, and whereas said George M. Nowell is informed that the United States District Court has recently admitted in evidence in this case, on motion of the appellees, copies of personal letters alleged to have been written by Thomas S. Nowell, one of the appellants herein, he, George M. Nowell, feels that the said the United States District Court would, on that account, have in its discretion, allowed the admission of this said affidavit in evidence, and especially since it appears on the face of the affidavit that said Payson knows nothing and never knew anything concerning the negotiations which took place previously to said stockholders' meeting between Thomas S. Nowell and the Endicotts, as regards the Johnson Group, and that the affidavit simply swears to the single fact that the records are correct, which fact could not be changed, enlarged upon, or developed, or further facts elicited by a deposition and cross-interrogatories, since this fact is the single fact that said Payson can conscientiously, and is willing to swear to.

8.

That said George M. Nowell, acting as attorney for appellant Willis E. Nowell, does not call in question the honesty, skill or diligence of said local attorneys at Juneau, but he feels aggrieved that his instructions [201] were not followed out, and therefore in performance of what he believes to be his full duty to his clients, he feels himself bound to make this final effort to secure the introduction into the case of this said affidavit.

9.

That said George M. Rowell believes that his duty to this Court and as its sworn officer is thus to move for the admission of said affidavit, as being of assistance to the Court in determining the question involved in this appeal.

10.

And in so moving the Court he prays that the Court will have regard to the inherent difficulties of the situation, such as the many thousands of miles intervening, the great lapse of time which is almost prohibitive in its effect upon the securing of testimony given under oath, and the other difficulties otherwise apparent on the face of the transcript of the record.

11.

That should the Court be unable to see their way clear to grant this motion and admit said affidavit in its present form, appellants respectfully submit that with the consent of the adverse parties, the deposition of said William M. Payson be treated as taken and his deposition later taken with as little delay as possible, and returned to this Court, and incorporated into the record of this said appeal.

Respectfully submitted,

GEORGE M. NOWELL,

Counsel for Appellants, and in Particular for Willis E. Nowell, One of the Appellants.

[Endorsed]: Filed Feb. 6, 1911. H. Shattuck, Clerk. By H. Malone, Deputy. [202]

Plaintiffs' Exhibit "F" [to Affidavit of George M. Nowell].

No. 1436.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

THOMAS S. NOWELL, WILLIS E. NOWELL,
NOWELL MINING AND MILLING COM-
PANY (a Corporation), and the ALASKA
NOWELL GOLD MINING COMPANY (a
Corporation),

Appellants,

vs.

JOHN C. McBRIDE, as Receiver of THE BER-
NER'S BAY MINING AND MILLING
COMPANY, and HENRY ENDICOTT, In-
tervenor,

Appellees.

Upon Appeal from the United States District Court
for the District of Alaska, Division No. 1.

**Petition Relating to Decree and Mandate [in C. C. A.
No. 1436].**

MALONY & COBB,
GEORGE M. NOWELL,
Attorneys for Appellants.

No. 1436.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

THOMAS S. NOWELL, WILLIS E. NOWELL,
NOWELL MINING AND MILLING COM-
PANY [203] (a Corporation), and the
ALASKA NOWELL GOLD MINING COM-
PANY (a Corporation),

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NER'S BAY MINING & MILLING COM-
PANY, and HENRY ENDICOTT, Inter-
venor,

Appellees.

Upon Appeal from the United States District Court
for the District of Alaska, Division Number 1.

[204]

And now come appellants after opinion and before
issue of mandate and move for leave to file a Peti-
tion relating to Decree and Mandate.

By their Solicitors,

MALONY & COBB.

GEORGE M. NOWELL.

**Petition Relating to Decree and Mandate [in C. C. A.
No. 1436].**

And now come defendants-appellants and respect-
fully represent—

1. That they have filed a petition for rehearing
herein upon certain parts of said case.

2. That, if such rehearing shall not be granted,

or shall be granted and this Honorable Court shall remain of the same opinion upon the facts as now appearing in the record herein, they can offer further testimony, as shown by the accompanying affidavits, material to the issues, in large part newly discovered, and so far as documentary practically inaccessible to defendants at the trial below, viz.:

a. That on June 24, 1896, the deeds conveying title in the Johnson Group to Willis E. Nowell were in escrow, and the full purchase price of \$25,000 consideration unpaid, and remained in escrow until final payment was made in 1898; and that these facts should justly be in evidence in relation to the matters of a conveyance of said properties by Thomas S. Nowell and Willis E. Nowell to said Berner's Bay Company in June, 1896. (See affidavit of George M. Nowell, under letter A.)

b. That William Endicott was not misled by the personal estimate of Thomas S. Nowell as to the value of the Johnson Group, but, on the contrary, treated them in correspondence as a mere prospect. (See affidavit of George M. Nowell, under letter B.)

c. That a letter of Thomas S. Nowell, dated June 23, 1896, shows a change as to the intention to offer the Johnson Group to the Berner's Bay Company at its June 24, 1896, meeting; and together with several [205] letters of said Thomas S. Nowell written within a few weeks after June 24, 1896, show as his reasons therefor, inability on the part of Thomas S. Nowell then to control or convey the legal title or anything but an option, and inability of said Company to pay the necessary purchase

price in cash. (See affidavit of George M. Nowell, under letter C.)

d. That, in fact, the Johnson Group was not offered to the Company at the stockholders' meeting of June 24, 1896, nor accepted by said Company, nor was there any contract made between said Company and said Nowells for the purchase of said Johnson properties, but that twelve properties, being the last twelve properties named in the call for said meeting as the same is recorded in the Company records and there attested by Arthur L. Nowell, Assistant Clerk, were offered by Thomas S. Nowell in behalf of himself and Willis E. Nowell, and accepted by vote of the stockholders. (See affidavits of William M. Payson and C. O. Barrows.)

e. That Plaintiffs' Exhibit "D" was a first draft written by Mr. Payson to include all the properties named in the call to see if the stockholders would vote to purchase the properties named therein and any other desirable properties, etc., under his supposition that all the named properties were to be offered, and that said changes in said paper were made before the meeting and before it was signed by Mr. Nowell (see Payson affidavit), and that said changes were made because Mr. Nowell was then unable to control or convey the title to the Johnson properties. (See affidavit of George M. Nowell.)

f. That the records of said Berner's Bay Company in fact were and are true records of the proceedings of the stockholders at the meeting of June 24, 1896, including the offer of Thomas S. Nowell for the last twelve properties named in the

recorded call and the acceptance as set forth; that such records were never falsely engrossed but the proceedings for said meeting were written out in the records by Mr. Payson prior to the meeting and used at the meeting, and the record thereof signed by Mr. Barrows as clerk as soon as the meeting was over, and have never been changed or altered. (See Barrows and Payson affidavits.) [206]

g. That the call served on the stockholders seven days before the meeting by sending each one of them an attested copy, and which they referred to in their proxies for the meeting, was the call recorded by Arthur L. Nowell, assistant clerk, as the same appears in the records; that such call was signed by all the directors, and the order of the enumeration of the properties therein was not changed with any fraudulent intent from the order in which the same were enumerated in any other call which may have been signed by a part of the directors, nor was any wrongful change ever made in the recorded call or in any call to make it correspond with the change in Mr. Nowell's offer above stated; that the only call served on the stockholders was the call recorded in the records. (See *Id.*)

h. That the parties complainant and intervening and Wallace Hackett have acquiesced in the dealings with said Johnson Group for over nine years and have repeatedly recognized the rightfulness of the Nowell title to the same, as appears by these newly discovered letters and writings. (See affidavit of George M. Nowell, under letter H.)

i. That such records of said Berner's Bay

Company as were at any time in the custody or control of Thomas S. Nowell or Arthur L. Nowell in Boston were at the office in Boston where directors' meetings were held, and were in their control as officers of said corporation and were open to inspection by any director or stockholder. (See affidavit of C. B. Faxon.)

j. That Frederick D. Nowell, while receiver of said Berner's Bay Company, from 1898 to November 15, 1905 (as to subsequent time see Tr. 509-10; 514), was never requested by any person to bring suit for a conveyance of the Johnson Group to the Berner's Bay Company, and never heard of any question as to the Nowell title to said Johnson Group which would demand such suit. (See affidavit of Fred'k D. Nowell.)

And petitioners further respectfully represent that the books of account and writings belonging to said Berner's Bay Company including, as they believe the original call for the meeting of June 24, 1896, a copy whereof is recorded, and attested to have been served, in said corporate records, and also two letter-press copy-books of the year 1896, the personal property of Thomas S. Nowell, are not within the control of petitioners but, as petitioners believe, are in the control of the [207] reorganization committee and are material to the issues in this case.

And petitioners further respectfully represent that the most of the hereinbefore offered written or documentary evidence was distributed amongst a large mass of business writings and records, the accumulations of a dozen or more years, and the

greater part of it locked up in a storage warehouse in Cambridge, Massachusetts. The only person connected with appellants and concerned in the matters in controversy who had remained in Boston and was conversant with these writings and records, Arthur L. Nowell, died in January, 1904, two years before this suit was brought. Thomas S. Nowell was in Alaska while the testimony was progressing, an old man hardly equal to a journey of 9,000 miles to Boston and back, in addition to a proper search through said mass of material, and moreover could not himself well determine questions of legal relevancy nor could he reasonably take his counsel to Boston or all of said mass of writings to Alaska; that his son George M. Nowell, attorney at law, did not come into the case as counsel until after the decree of January 5, 1907, and had no knowledge that the above-mentioned mass of writings contained any pertinent documentary evidence, until after the argument in this court, nor, it may be added, had he any such connection with Thomas S. Nowell's office or understanding of his business matters as to put him on notice of the relevancy of any of said writings; that some of said documents were in Juneau among old papers accumulating for some fifteen years, and defendants were not put upon notice of any reason why these old papers should be searched for evidence material to this case before or until the opinion of the court below; that more than a year after the decision of the court below, in searching through these old papers concerning other matters, a part of the documentary evidence herein-

before mentioned was brought to light. (See affidavit of Fred'k D. Nowell.)

That none of the counsel for defendants-appellants, until after the decree of the lower court, had any such knowledge of or as to the newly discovered documentary evidence hereinbefore referred to as to prejudice appellants-defendants' right now to benefit by the same.

That as to the proposed evidence from Barrows and Payson:

(1) Its necessity was not apparent to counsel in view of plaintiffs' testimony and of the rebuttal testimony of Thomas S. Nowell [208] (Tr. p. 305 et seq.) denying that any offer of the Johnson properties was made at the meeting of June 24, 1896, supported by the strong presumption of the truthfulness of sworn corporate records, and their corroboration of said Nowell's testimony, and the fact as shown on their face that they had not been altered as charged in the bill of complaint.

(2) Said trial was begun April 27, 1906. The deposition of Henry Endicott taken in Boston and to which said exhibit "D" was attached was deposited in the United States mail at Boston under registered cover on April 9, 1906, but eighteen days before the trial in Juneau, of which ten days, at least, must have been consumed in transit. It does not appear of record that exhibit "D" was ever submitted in evidence to T. S. Nowell during his examination in March, 1906, neither was he asked concerning it so as to put him on notice of it, nor in a way to call for explanations on his part.

(3) The allegations in the complaint of fraud, if sufficient in the absence of demurrer, were general and wholly against the Nowells, no reference being made to Barrows or Payson, and no indication of reliance on such facts as to corporate records or on the complicity of said parties therein, as are included in the findings of fraud by the court below.

(4) Plaintiffs and defendants both inquired of said Payson as to his knowledge, and he, understanding such inquiries to refer to personal relations, agreements or contracts between Thomas S. Nowell and his associates not shown in the corporate records, replied that he did not have any knowledge as to these matters beyond what the corporate records and transactions indicated.

(5) Said George M. Nowell reported the decision of January 5, 1907, to said Payson, and was informed by him that the records were true and unchanged, and that he could so testify; and he did give his affidavit to that effect, which was transmitted to Alaska, but was not included in the record, which circumstances were stated in a motion filed by George M. Nowell in this Honorable Court on May 27, 1907.

(6) That Alaska is 4,500 miles from Boston, and in the winter time it takes on an average four weeks for a letter and answer.

(7) That the testimony herein prayed for would utterly disprove [209] fraud as found by the court below on the part of T. S. Nowell, Arthur L. and Willis E. Nowell, or any complicity in any fraud on the part of said Payson or said Barrows.

WHEREFORE, appellants pray that the United

States District Court for Division Number One, Alaska, may be directed in the mandate of this Court to grant, upon a proper motion presented to said District Court, leave to defendants to take further evidence substantially as aforesaid; or that leave be granted in said mandate to said District Court to receive and entertain a motion for such leave; and that appellants may have such other and further relief as may be consistent with equity and good conscience and to your Honors may seem meet.

THOMAS S. NOWELL,
WILLIS E. NOWELL,
NOWELL MINING & MILLING COM-
PANY,
ALASKA NOWELL GOLD MINING COM-
PANY,

By MALONY & COBB,
GEORGE M. NOWELL,
Their Attorneys.

I certify that in my opinion the new evidence above referred to and prayed for is material and proper, and that this motion is not made for the purpose of delay.

MALONY & COBB,
GEORGE M. NOWELL,
Of Counsel for Defendants-Appellants.

POINTS IN SUPPORT OF PETITION.

Appellants-Defendants, asking opportunity to file a brief on this petition or for an oral argument, if and as necessary, ask your Honor's attention to the following brief points as to the relevancy of the proposed testimony and its effect upon the rights of all

parties, in view of the case as it now stands and of the reasons why this new testimony was not previously before the Court.

PLAINTIFF'S CASE.

Upon their bill alleging fraud generally, the burden being upon plaintiffs to prove it, substantially their only testimony to the specific fraud or frauds, finally relied on by them, and found by the Court below, was first, the corporate record-books; second, in connection with these records a paper signed by the President and three [210] Directors, differing from the recorded call, and without other proof than that it was found by the intervenor producing it, who did not testify that it was sent out as a call or that it was served upon anybody; third, an interlined paper (Exhibit "D") first drawn so as to offer the properties named in the call, and interlined to include only the "last twelve" therein named, as a paper offered the stockholders at their meeting of June 24, 1896, but without any evidence that this paper was presented at the meeting, or that the interlineations were not made before the meeting; fourth, indefinite statements as to conversations and agreements between T. S. Nowell and the intervenor and William Endicott, and an unsigned letter to the intervenor.

DEFENDANTS' CASE.

Defendants' testimony included T. S. Nowell's testimony of negotiations with his associates as to the "Johnson properties" in connection with the exploitation of many Alaska properties, including "a proposition to include the fifteen claims" (Tr. 305).

“There may have been some talk with some of the directors in regard to that, but it did not take shape or develop into a direct proposition to the stockholders” (Tr. 309). That prior to the stockholders’ meeting “it was decided to simply include the twelve claims” (Tr. 306), for which “there was a good reason,” and that “there was no proposition of that kind” (i. e., for the fifteen claims), but that “The proposition was for the twelve claims that was made at the stockholders’ meeting” (Tr. 307). The entire fifteen claims “never were offered formally or informally to the Company to my knowledge or recollection.” “I do not deny that in the talk with some of the stockholders that was suggested, but for good reasons was not carried out” (Tr. 320).

Nowell could not deny Endicott’s statement of his statement, six months after the meeting, that the reason the properties were not conveyed was the lack of a patent, because Endicott testified after Nowell.

This testimony was confirmed by the sworn corporate records of the meeting of June 24, 1896, introduced by plaintiffs and, as defendants assumed, neutralized any ostensible grounds of suspicion as to fraud by means of false records, or, by mutilation of any offer to make it conform to a false record of an offer not in fact made. [211]

Nowell’s above-quoted testimony was of weight unless specifically contradicted by evidence and not by inference until discredited by proof of the contrary of the substantial fact Nowell swore to, viz., that the Johnson properties were not offered by him to the stockholders at the meeting. Especially was

it of weight in the absence of any apparent reason for fraud on his part; or on the part of the three attendants at the meeting; for whatever his contractual or other obligations to his associates, as individuals, in order to avoid them the fraud, as alleged, or found, was entirely uncalled for and superfluous; he had simply to abstain (as the weight of the testimony is that he did) from offering the Johnson properties at the meeting in order to avoid making a contract between himself and said company.

Plaintiffs' case, on all the testimony, seems to have rested entirely upon several possibilities, viz.: that Exhibit "D" may have been presented at the meeting; that the words "last twelve" in Exhibit "D" might have been interlined after the meeting; that the corporate records may have been engrossed at Boston after the meeting to show an offer of the "last twelve" properties named in a call, which call may have been fraudulently altered.

Apparently these "possibilities" were accepted by the court below in the absence of witnesses who were not called, but must have known the facts, as sufficient proof that Exhibit "D" uninterlined was presented to the June 24 meeting; that a different call (from that recorded and attested by the Clerk as having been served) was falsely recorded; that a false entry was made on the records at Boston some time after the meeting to falsely show that a different offer from the uninterlined paper was made to and accepted by the stockholders at said meeting; that subsequent to the meeting Exhibit "D" was interlined with the words "last twelve," and that subse-

quent to the meeting the records were falsely engrossed to correspond to the interlined Exhibit "D."

This Honorable Court has refused to reverse the findings below for the reasons stated in its opinion. But petitioners believe that this Court can have no doubt that if the testimony hereinbefore offered shall be taken and believed, fraud will be eliminated from this case and charges of fraud in the bill affirmatively disproved. That is, [212] all fraud by the false engrossment or change of records and by alterations or interlineations in T. S. Nowell's offer, even if his offer was made to the meeting by Exhibit "D," wholly disappears, together with any fraud on T. S. Nowell's part as to these matters which, as alleged and found, is so inextricably connected with the alterations of Exhibit "D," and the falsity of the records as to so far be dependent upon such alterations. Any other fraud resulting from T. S. Nowell's failure to convey the Johnson properties would be disproved by his letters just previous to and shortly after the meeting, showing that his failure to convey the Johnson properties arose from his inability to then obtain the title for lack of means, and that he was trying to get their owner, Johnson, to take his promissory notes secured by bonds of the company. His mere failure to offer the Johnson properties to the meeting of June 24 thus becomes at most a failure to perform a contract with the intervenor (whatever exact contract was thus made), arising from his financial inability and uncertainty.

GROUND OF RELIEF OTHER THAN FRAUD.

If fraud as alleged by plaintiffs or found in the court below be thus eliminated, and any contract with the Berner's Bay Company thus also disappears from the case, then the question of laches on the part of the intervenor—a stockholder or possibly two stockholders out of 28 stockholders, holding but 336 shares out of a total 10,000 shares, 8,556 of which were represented at the meeting of June 24—will be a different question from the question of laches upon facts as found by the court below. Indeed, it will be a question which apparently has been adjudicated in this court, in favor of defendants, *Moore v. Nickey*, 133 Fed. 289.

THE POWER OF THE COURT ON THIS PETITION.

This Court sitting in equity, has power in its mandate to the court below to allow or order the taking of further testimony if in its opinion, essential to justice.

On petition for a bill of review, "There is no universal or absolute rule which prohibits the courts from allowing the introduction of newly discovered evidence" in a case where "indispensable to the merits and justice of the cause."

Craig v. Smith, 100 U. S. 226, citing *Wood v. Mann*, 2 Sumn. 334; [213] 30 Fed. cases, 451.

Since the United States Appellate Courts Act, not only Bills of Review—see *In re Gamewell Fire Alarm Tel. Co.*, 73 Fed. 908; *Boston & R. Electric St. Ry. Co. v. Bemis Car-box Co.*, 98 Fed. 121; *Novelty Tufting Machine Co. v. Buser*, 158 Fed. 83—but also Petitions

for Directions in the Mandate to the lower court as to further testimony are well known in practice.

Sacks v. Brooks, 85 Fed. 970.

Further testimony seems to be proper "where the judge himself, upon or after the hearing, entertains a doubt, or when some additional fact, or inquiry is indispensable to enable him to make a satisfactory decree."

Wood v. Mann, Fed. Cas. No. 17,953 (head-note, No. 1).

If upon appeal under the present United States equity practice, the Appellate Court is of opinion that, as in this case, some additional fact or inquiry is essential to justice its power so to order would seem to be clear.

Respectfully submitted,

MALONY & COBB,
GEORGE M. NOWELL,
Attorneys for Petitioners.

AFFIDAVIT OF WILLIAM M. PAYSON.

I, William M. Payson, on oath depose and say:

I am a lawyer, fifty-five years of age, admitted to practice in the Supreme Court of Maine in 1876, in the Supreme Court of the United States in 1891, and in the Supreme Court of Massachusetts in 1898.

I began to practice law at Portland, Maine, in 1876, became specially interested in the legal work relating to the organization of corporations and other branches of corporation law, took rooms in Boston with other lawyers about 1891, and afterward became a resident of Boston.

Before leaving Portland, I usually acted as the

resident clerk required by Maine laws of the corporations I organized, and have frequently written records in the corporation record books, partly for certainty and partly because typewriting was not formerly so common as now.

About 1894, I arranged with Mr. C. O. Barrows, for many years now past an official stenographer of the Supreme Court of Maine, and having [214] offices connecting with mine in Portland, to act as the resident clerk, and frequently have had myself elected clerk *pro tem*, or deputy clerk of some corporations, for convenience in making records in his absence. Except in this way, I have not been a clerk or deputy clerk for anyone.

About 1886 I began to act for Mr. T. S. Nowell and his various associates in organizing a number of corporations, among which were the Berner's Bay Mining & Milling Company in 1892, the Northern Belle Gold Mining Company, Seward Gold Mining Company, and Ophir Gold Mining Company in 1897, to take over the Berner's Bay Mining & Milling Company properties, and the Nowell Mining & Milling Company in 1898 to take over the Johnson properties, so called.

Duplicate records were made, one for Maine and one for use elsewhere. As counsel for said corporations I have prepared their legal papers, forms of calls and notices, votes, records, drafted bond mortgages and attended meetings of stockholders and sometimes of directors. All the records made by me are true records of the transactions they purport to record.

The record of the stockholders' meeting of the Berner's Bay Mining & Milling Company held June 24, 1896, was written by me in the record book I have, and I believe in the other record book, and is a true statement of what was done at such meeting.

Plaintiffs' Exhibits "I," "G," and "H," as printed on pages 593 to 608, inclusive, in the transcript of record for the Court of Appeals in the case of Thomas S. Nowell et al., Appellants, vs. John C. McBride et al., Appellees, appear to be together correct copies of said record, except the change in the transcript of "W" to "C" as Fairchild's middle initial, and the omission of "such" before "stock being retained," line 4, p. 597, of transcript.

Said record was written out in the book I have by me at my office in Boston, prior to the meeting, because of its length and to enable a correct and formal holding of said meeting. It was carried to Portland and the meeting was held according thereto, including the action therein stated, and no other action, and at its conclusion this true record of the proceedings actually had was signed by Mr. Barrows as clerk of the corporation. Such record has never been changed or altered. [215]

Arthur L. Nowell, C. O. Barrows and myself were personally present at the meeting and I think no one else.

The offer, and the only offer, presented to said meeting from T. S. Nowell is correctly recorded and did not include the Johnson properties so called, but was for the last twelve properties named in Article III of the call shown on the records.

I don't certainly remember whether the offer was in typewriting or not. I do remember being at Mr. Nowell's office before the meeting—it must have been two or three days before—to get final information to enable me to draft and complete proper votes and papers for increasing the capital stock, purchasing properties and authorizing a mortgage and bonds, and talking with him about such matters and about his sending an offer to the meeting for the stockholders to accept. I am quite sure we had before us a draft of an offer that included all the properties named in the call, and remember his saying, “the Johnson properties are not to go in,” or some like expression, and my replying that in that case the form of offer we had would not do and would have to be changed, and I think I then changed it to include the last twelve properties named in the call. To do this we must have the call or copy of it.

Within the last week, I have found in an old envelope in a drawer of my safe a typewritten copy of the recorded call, attested by Arthur L. Nowell under his written signature, in which the names of the Johnson properties are bracketed in pencil, and I have no doubt I used this copy at the conference with Mr. Nowell as to his offer, and again in writing out the records for the stockholders' meeting as above stated.

Some year or two ago, I can't say just when, a member of the New York Committee handed me a sheet of yellow paper, such as I use for rough first drafts of instruments to be put in shape and copied or typewritten, with writing on it in my hand, and

asked what it was. I glanced over it hastily and not calling to mind anything about it, replied I didn't know, and little or nothing further was said about it. I now believe it was a first draft by me of an offer for Mr. Nowell to make to the stockholders' meeting, written by me under the supposition that all the properties named in the call were to be included, and that it was changed at my said interview with Mr. Nowell, to include the last twelve only. If this rough draft was signed by Mr. Nowell and by any chance used at [216] the meeting, it was only so used after it was changed as just stated. My impression is that a typewritten offer was used at the meeting.

I don't remember drawing any form of call for that meeting, but should naturally have done so, and have no doubt I did. The call I recorded was the one Arthur L. Nowell certified that he sent to all stockholders, as shown in the record, and was the one under which I then understood the meeting was to be held. I have had such understanding and belief ever since. It was the business of Arthur L. Nowell to attest and send to all stockholders seven days before the meeting a true copy of the call, and I have no doubt he did so as he certified. I never knew or heard of any other call being sent out to the stockholders, and do not believe any other call was so sent.

I have nearly all the proxies used at this meeting, evidently specially typewritten and in the usual form except that they authorize the appointee, "to vote and act for me upon all matters named in the call for said meeting, which is hereby referred to as a part

hereof"; a form of proxy used for brevity with calls of considerable length, in connection with an attested copy of the call mailed with such proxy to every stockholder as notice of the meeting.

No alteration for any wrongful purpose was ever made by me, or to my knowledge, in any call or notice or the record of any call or notice or other writing, either by changing the order in which the properties were enumerated or by changing any call, notice or record to make it correspond with the changes made as above stated in the first draft of the offer of T. S. Nowell to the stockholders.

The whole business of this meeting was transacted and the records of it were written by me and signed by Mr. Barrows, upon the understanding and belief that it was just what all the stockholders desired and were agreed upon.

It was done under instructions and authority that came to me in the same way that instructions and authority had previously come to me in all corporations in which Mr. Nowell was concerned, and which subsequently came to me in such cases while he was in Boston.

I have not infrequently met Mr. Nowell's associates as officers, directors and stockholders, at his office or my own, and no [217] one of them ever suggested to me, or in my hearing, that his directions were not to be followed or that any of their proxies had not been voted as they wished. There was no possible concealment that I was aware of as to what was to be done at this or any other meeting, or of what, in fact, had been done as shown by the records.

The records of the stockholders' meeting, made, as I have said, and including the call and notice and Mr. Nowell's offer excluding the Johnson properties, were before the directors' meeting of June 30, 1896. I was present at that meeting to see that proper action was taken and votes passed to authorize the half million of bonds and the trust mortgage I had prepared to secure the bonds; and this mortgage was before the meeting and considered and authorized.

Mr. Wallace Hackett was a director present at this directors' meeting, and in 1898 was one of the incorporators of the Nowell Mining & Milling Company, organized to take over the Johnson properties.

In March, 1897, a meeting of some thirty-five stockholders of the Berner's Bay Mining & Milling Company, including all the directors except Mr. Fairchild, was held by my assistance by proxies authorizing votes that T. S. Nowell might sell any or all the corporate properties on any terms and for any prices he in his discretion should deem best.

It was not until about 1905 that I first heard of any disagreement between Mr. Nowell and any of the stockholders over the Johnson properties, I think from Mr. Hackett, who spoke of a New York combination formed or in prospect to buy the properties in the receiver's possession.

Members of a New York committee afterwards came to see me several times and spoke of taking my deposition, but never did so. I told them in substance that I knew nothing of any agreements of Mr. Nowell and any of his associates concerning the Johnson properties except what the various corporate

records and transactions indicated.

Mr. George M. Nowell also came to see me, and I told him the same thing. In February or March, 1907, George M. Nowell told me it was claimed in a suit for the Johnson properties in Alaska that the records of the Berner's Bay Mining & Milling Company had been improperly changed or altered. I told him the matters stated in the records were true and the records as made were true and had not been changed, and I could so testify, and afterwards gave him my affidavit to that effect as to [218] the meeting of June 24, 1896.

As I am a stranger and wholly unknown in the jurisdictions where this litigation is pending, I annex hereto copies of statements written in 1898 concerning myself from Chief Justice Peters and Associate Justice Thomas H. Haskell, then of the Supreme Court of Maine, and also refer to affidavits from Hon. Frederic Dodge and Hon. Clarence Hale, Judges of the United States District Courts of Maine and Massachusetts.

WILLIAM M. PAYSON.

COMMONWEALTH OF MASSACHUSETTS.

Suffolk,—ss.

Subscribed and sworn to the twenty-first day of July, 1898, before me,

[Seal]

J. WINSOR DAVY,
Notary Public.

State of Maine,
Supreme Judicial Court.

Bangor, February 4, 1898.

To Whom It May Concern,
Court or Committee.

William M. Payson, Esq., of Portland, is about removing to Boston, and contemplates admission to the Massachusetts Bar, for which he is eminently qualified. He has been in the practice in our State and Courts for more than twenty years, is a learned lawyer and able man and most honorable citizen.

Respectfully,
(Signed) JOHN A. PETERS,
Chief Justice.

State of Maine,
Supreme Judicial Court.
Portland.
H.

February 3, 1898.

To The Committee of Suffolk Bar.

Gentlemen: It gives me pleasure to say that Mr. William M. Payson, formerly of this city, is a member of Cumberland Bar in good and regular [219] standing. He was admitted some twenty years ago, and is a gentleman worthy of recognition by the Suffolk Bar.

Yours respectfully,
(Signed) THOMAS H. HASKELL.

AFFIDAVIT OF FREDERIC DODGE.

I, Frederic Dodge of Belmont, Massachusetts, on oath depose and say:

I am Judge of the U. S. District Court for the Dis-

trict of Massachusetts. I have long known of the honorable reputation of the Payson family in Maine and in Massachusetts where I reside, and I have for some years personally known Wm. M. Payson, Esq., formerly of Portland and now of Boston. He is a lawyer of many years' practice, especially, as I understand, in corporation law, and is a man whose reputation for truth and veracity as a citizen and as a lawyer I have never heard questioned in any manner whatever.

(Signed) FREDERIC DODGE.

COMMONWEALTH OF MASSACHUSETTS.

Suffolk,—ss.

Subscribed and sworn to this 21st day of July, 1908,
before me,

[Seal] (Signed) WILLIAM NELSON,
Notary Public.

UNITED STATES COURTS.

Judge's Chambers,
Portland, Maine.

I, Clarence Hale, of Portland, in the State of Maine, on oath depose and say: I am Judge of the United States District Court for the District of Maine. I have been acquainted with William M. Payson, Esq., formerly of Portland, in the State of Maine, for thirty-five years. I have known his character for integrity ever since he came to the bar. His reputation for integrity and honesty is of the very highest, both in this community and in Boston, where he now resides. In holding court in Boston during the past six years I have known Mr. Payson in Boston, as well as in Portland. [220]

Mr. Payson is a man of most honorable ancestry. His father was a well-known lawyer of high character in the Maine bar; his grandfather was Rev. Edward Payson, D. D., who was one of the most eminent divines that New England has ever produced. Mr. Payson's present family is of the highest character and standing in Maine. Mr. Payson's character for truth and veracity is of the very highest. His personal character is of the very highest in every respect.

State of Maine,
Cumberland,—ss.

Portland, July 18, 1908.

(Signed) CLARENCE HALE.

Portland, July 18, 1908.

Subscribed and sworn to, before me,

(Signed) JAMES E. HEWEY,

Clerk U. S. District Court, Maine District.

[Seal of the District Court, Maine]

AFFIDAVIT OF C. O. BARROWS.

I, C. O. Barrows, of Portland, Maine, on oath depose and say: I am by profession a stenographer and am the official stenographer of the Supreme Judicial Court of Maine; I am fifty-one years of age; I have acted, since previous to 1896, as resident clerk of corporations organized by William M. Payson, Esq., formerly of Portland, now of Boston. I so acted for the Berner's Bay Mining & Milling Company. The record beginning on page 53 and ending on page 74 of the record book of that company, there being also, as I recall, a duplicate record book, is attested by me. I remember attending meetings of said company, but I have no special recollection, after twelve years, of

this or any other particular meeting thereof. In the case of meetings of said corporations organized by Mr. Payson, he frequently, where there was to be no question as to the proceedings, himself wrote out the proceedings and the same were then acted upon accordingly. I do not particularly remember whether that was done in this case. I have no question that the record of said meeting of June 24, 1896, is a true record of the proceedings, as I certainly should not have signed it as such if I had not so understood at the time. The record above referred to as commencing on page [221] 53 and ending on page 74, is the record of a special meeting of the stockholders of said Company including a call for the meeting; the record of the special meeting beginning on page 57.

(Signed) C. O. BARROWS.

Subscribed and sworn to before me this sixteenth day of July, A. D. 1908.

[Seal] (Signed) HENRY W. SWASEY,
Notary Public.

My commission expires June 12, 1914.

AFFIDAVIT OF FRED'K D. NOWELL.

I, Fred'k D. Nowell, upon oath depose and say: I am the son of Thomas S. Nowell, and the brother of Willis E. Nowell; since about September 3, 1907, my legal residence has been in Waterbury, Connecticut; from February 12, 1898, to about October 9, 1906, I was receiver of the Berner's Bay Mining & Milling Company; since June 20, 1908, I have, with my brother, George M. Nowell, of counsel in this case, and at his request, made as thorough a search as the

limited amount of time available would permit through the voluminous documents and writings connected with and concerning the various mining operations of Thomas S. Nowell, which said documents and writings are stored in a storage warehouse in Cambridge, Massachusetts; that a large part of this newly discovered evidence was found dispersed amongst the above-mentioned documents and writings; that in the month of October, 1907, my family left Juneau and came to Waterbury, Connecticut, bringing with them a quantity of household effects and some of my private papers, the accumulation of a sixteen years' residence in Alaska; that while searching in February or March, 1908, through these private papers concerning other matters, a part of this newly discovered evidence was brought to light; that during all the time your affiant was receiver of said Berner's Bay Company up to November 15, 1905, he never was requested by any person to bring suit or institute legal proceedings of any kind whatever for a conveyance of the Johnson Group to said Berner's Bay Company; that he had taken an active part in some of the negotiations pending at various times for the sale of said company's properties; that he had concerning thereof many times been in [222] business consultation on company matters with the Endicotts and Hackett; that none of these persons ever requested your affiant to bring such suit, either in writing or verbally, or ever intimated to him that such suit should be brought; that, on the contrary, the proportionate interest that Thomas S. Nowell was to receive in consideration of a conveyance of the Johnson Group to

any new company to be formed as a result of such negotiations was repeatedly discussed with your affiant by said Endicotts and Hackett; that I was not in Alaska at the time of the trial of this cause in the court below.

FRED'K D. NOWELL.

COMMONWEALTH OF MASSACHUSETTS.

Suffolk,—ss.

Subscribed and sworn to, before me, this 24th day of July, 1908.

[Seal]

JOHN C. RICE,

Notary Public.

My commission expires May 28, 1909.

AFFIDAVIT OF GEORGE M. NOWELL.

I, George M. Nowell, upon oath depose and say:

That I am a lawyer; that I am 46 years of age; that I was 37 years of age before I began to study law; that in 1902, at the age of 40 years, I was admitted to the Massachusetts bar; that I am the son of Thomas S. Nowell and the brother of Willis E. Nowell; that I did not come into this case as counsel until after the decree of January 5, 1907; that I was never connected as clerk, private secretary, or otherwise, with the office of Thomas S. Nowell; that I had no more than a general knowledge of said Thomas S. Nowell's business; that I had no knowledge of the transactions concerning the Johnson Group; that previous to June 20, 1908, I was unacquainted with the contents and purport of the business writings and records of Thomas S. Nowell; that without the assistance of F. D. Nowell who is at present in Boston and who has personal knowledge of many of the corporate transactions, it

would have been well-nigh impossible for me to have made an intelligent search of said writings and records.

A.

That I have in my possession letters, writings, statements and [223] receipts tending to prove, and which in my opinion do prove, that the deed conveying title in the Johnson Group to Willis E. Nowell was, on June 24, 1896, in escrow, subject to the payment of the full purchase price of \$25,000, and that such deed remained in escrow until the full payment of said purchase price of twenty-five thousand (25,000) dollars in the year 1898.

B.

That I have in my possession letters written by William Endicott tending to prove, and which in my opinion do prove, that said William Endicott knew that the Johnson Group was not a developed mine, that it was a prospect only, and further considered that the personal estimate of Thomas S. Nowell as to the value of the Alaska mines was exaggerated and over-sanguine.

C.

That I have in my possession a letter of Thomas S. Nowell, dated June 23, 1896 (one day previous to the stockholders' meeting of June 24, 1896), which tends to prove, and in my opinion does prove, the fact that a change as to the intention to offer the Johnson Group to the Berner's Bay Company was made previous to said meeting, which said letter, taken in connection with several other letters written during a few weeks after June 24, 1896 (which said several

letters are also in my possession), all tend to prove the facts and in my opinion do prove the facts:

First, that a change was made previously to the meeting of June 24, 1896, as to the intention to offer the Johnson Group to the Berner's Bay Company at said meeting; second, that the reason therefor was that said Nowell could not convey the legal title thereto or anything more than an option to purchase; and third, that said company was unable to pay the purchase price in cash owing to a lack of funds in the treasury and to the difficulty experienced in raising funds to meet current expenses, resulting from a tight money market and other causes.

H.

That I have in my possession a large number of letters, copies of contracts, agreements and other writings tending to prove the facts and which in my opinion do prove the facts:

First, that parties complainant and intervening and Wallace Hackett [224] have acquiesced in the dealings that have been had with the Nowells concerning the Johnson Group; and

Second, that these said parties have repeatedly recognized the rightfulness of the Nowell title to said Johnson Group, and have acquiesced in the assertion by the Nowells of the power and right of disposition over the same.

GEORGE M. NOWELL.

COMMONWEALTH OF MASSACHUSETTS.

Suffolk—ss.

Subscribed and sworn to, before me, this twenty-fourth day of July, 1908.

[Seal]

JOHN C. RICE,
Notary Public.

My commission expires May 28, 1909.

AFFIDAVIT OF C. B. FAXON.

I, C. B. Faxon of Boston, Massachusetts, on oath depose and say:

That I am an accountant; that at present I am in the employ of the U. S. Coal & Oil Company; that at the time of the transactions in question I was in the employ of Thomas S. Nowell, President of the Berner's Bay Company, as bookkeeper; that I kept the books of account of said company; that said books of account are a true and correct record of the corporate transactions at Boston; that all records and other books pertaining to the corporate business kept in Boston were kept at the office, 5 Tremont Street, at which office the directors' meetings were held; that all such records and other books were in the possession of T. S. and A. L. Nowell as officers of said Berner's Bay Company; that any and all record-books, books of account and other writings, kept at said office were open at all reasonable times to the personal inspection of any director or stockholder of the Berner's Bay Company; that in several instances I have made up statements from the books for various stockholders; that such statements were compiled directly from the books and were correct; that neither Thomas S. Nowell or Arthur L. Nowell ever at-

tempted in any way to control, modify or alter any entry or entries made in any such books of account or any statement I took from them, so far as my personal knowledge goes; that as far as I know there was [225] never any attempt during my employment in such capacity, to conceal or withhold any book or entry therein from the knowledge or inspection of any party in interest; that whenever any director or stockholder requested information contained in said books of account as to company matters it was freely given and every facility for learning the same placed at his disposal.

(Signed) C. B. FAXON.

COMMONWEALTH OF MASSACHUSETTS.

Suffolk—ss.

Subscribed and sworn to, before me, this 24th day of July, 1908.

[Seal]

JOHN C. RICE,
Notary Public.

My Commission expires May 28, 1909.

[Endorsed]: Filed Feb. 6, 1911. H. Shattuck,
Clerk. By H. Malone, Deputy. [226]

Plaintiffs' Exhibit "G" [to Affidavit of George M. Nowell].

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. 1436.

THOMAS S. NOWELL, WILLIS E. NOWELL,
NOWELL MINING & MILLING CO., a
Corporation, and THE ALASKA NOWELL
GOLD MINING CO., a Corporation,
Appellants,

vs.

JOHN C. McBRIDE, as Receiver of THE
BERNER'S BAY MINING & MILLING
COMPANY, and HENRY ENDICOTT, In-
tervenor,

Appellees.

Upon Appeal from the United States District Court
for the District of Alaska, Division Number One.

PETITION TO OPEN UP DECREE FOR
FRAUD OF THE PARTIES IN PROCUR-
ING THE SAME

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. 1436.

THOMAS S. NOWELL, WILLIS E. NOWELL,
NOWELL MINING & MILLING CO., a
Corporation, and THE ALASKA NOWELL
GOLD MINING CO., a Corporation,
Appellants,

vs.

JOHN C. McBRIDE, as Receiver of THE
BERNER'S BAY MINING & MILLING
COMPANY, and HENRY ENDICOTT, In-
tervenor,

Appellees. [227]

Upon Appeal from the United States District Court
for the District of Alaska, Division Number One.

**Petition to Open Up Decree for Fraud of the Parties
in Procuring the Same [in C. C. A. No. 1436].**

PETITION TO OPEN UP DECREE FOR
FRAUD OF THE PARTIES IN PROCUR-
ING THE SAME.

And now come defendants-appellants and respect-
fully represent:

1. That they filed on July 31st, 1908, a Petition
Relating to Decree and Mandate offering to show
further testimony material to the issues, and which
they believed would absolutely disprove the charges
alleged by complainants-appellees which petition was
denied by this Honorable Court on November 2d,
1908.

2. That in view of the well-established principle
that fraud vitiates all things in law and equity and
that a court of equity will never allow a decree to
stand that has been obtained by means of fraud and
deception practiced upon it, we respectfully petition
to show this Honorable Court as follows:

a. That Henry Endicott, intervenor herein,
claimed that the undersigned typewritten memo-
randum dated June 3d, 1896, embodied the terms of
the contract to be carried out and he alleged that the
three (3) said mining claims in dispute (the Johnson

Group) had actually been offered to and accepted by the Berner's Bay Company at the Stockholders' Meeting of June 24th, 1896, and that subsequently to said Stockholders' Meeting of June 24th, 1896, the official records had been fraudulently altered and changed by the insertion in an offer of sale of the words "last twelve" so as to exclude from said offer, said three (3) mining claims, thereby changing the true intent and meaning of said corporate records.

b. That the whole testimony of Henry Endicott, intervenor, was based upon the claim that it was a fraud upon him to convey said three (3) mining claims to said Berner's Bay Company, in accordance with the [228] terms of said unsigned typewritten memorandum of June 3, 1896.

c. That one of the excuses Henry Endicott gave for the nine and one-half ($9\frac{1}{2}$) years of delay was, the fact that the undersigned typewritten memorandum offered in his behalf to prove the terms of the contract had been lost and was not found until the year 1900.

d. That in the appeal of George M. Nowell et al. vs. The International Trust Company et al., No. 1641, in this court, the Court below found that said Thomas S. Nowell, and Willis E. Nowell had on June 24th, 1896, at said Stockholders' Meeting, offered the said Johnson Group to said Berner's Bay Company, and that said Berner's Bay Company had accepted the offer and had become the equitable owner thereof.

e. That at the trial below of the appeal of George M. Nowell et al. vs. The International Trust Company et al., No. 1641, in this court, evidence was

offered and witnesses examined concerning the issues involved in the appeal of Thomas S. Nowell et al. vs. John C. McBride et al., No. 1436, in this court, and it must be conceded that this latter named cause has to all intents and purposes been incorporated into and made a part of the record of the said appeal of George M. Nowell et al. vs. The International Trust Company et al., No. 1641 of this court.

f. That it appears of record in the appeal of George M. Nowell et al. vs. The International Trust Company et al., No. 1641 in this court (Tr. 581 et seq.) that a certain contract described in said record as the Mines Securities contract, was made on February 6th, 1902, between the Northern Belle Gold Mining Company and Thomas S. Nowell of Juneau, Alaska, individually, parties of the first part; The Mines Securities Corporation, party of the second part; the majority of the holders of the mortgage bonds of the Berner's Bay Mining & Milling Co., parties of the third part; and the Seward Gold Mining Company, the Ophir Gold Mining Company and the Nowell Mining & Milling Company, the owners of what is known as the Johnson properties located near the Northern Belle Gold Mining Company's property in Alaska Territory, parties of the fourth part. (Case No. 1641, Tr., pp. 581-582.)

At pp. 585-586 of the record (Case No. 1641), the contract reads as follows: [229]

“The cost of running the Kensington tunnel to its present extent, viz.: six hundred and twenty-five feet having been paid by the Nowell Mining & Milling Co., it is agreed that the expense of the

next six hundred and twenty-five feet, if run, shall be borne by the party of the second part, and that the cost of all further work and equipment in said tunnel through the Northern Belle Company's ground which may be done and required shall be shared equally between the Nowell Mining & Milling Company and the party of the second part, but that the entire cost of any extension beyond the ground of the Northern Belle Company's properties is to be borne by the said Nowell Mining & Milling Company."

At p. 587 of the record (Tr. Case No. 1641) the contract reads as follows:

"reserving, however, the rights of way and terminal facilities given by the stockholders of the Northern Belle Gold Mining Company to the owners of what is known as the Johnson Mines, since organized and incorporated under the name of Nowell Mining & Milling Company."

At pp. 591-592 of the record (Tr. Case No. 1641) the contract reads as follows:

"IX. It is contemplated at the date of this agreement by the first, second and fourth parties hereof to form a corporation to purchase the aforesaid railroad, wharf, warehouse, and terminal facilities, and pay for the same by issue from its capital stock, the said party of the first part to receive two-fifths, the said party of the second part two-fifths and the said party of the fourth part one-fifth for their respective rights, privileges and interest in said railroad, wharf, warehouse and terminal facilities."

At p. 593 (Tr. Case No. 1641) the contract is signed as follows:

“(Seal of the M. S. Cor.)

THE MINE SECURITIES CORPORATION.

THOS. J. HURLEY, President.

Seal attested: GEO. J. SCHERMERHORN, Treas.

HENRY ENDICOTT. [Seal]

WALLACE HACKETT. [Seal]

NORTHERN BELLE GOLD MINING COMPANY. [230]

By THOMAS S. NOWELL, President.

THOMAS S. NOWELL. [Seal]

SEWARD GOLD MINING COMPANY,

By THOMAS S. NOWELL, President.

OPHIR GOLD MINING COMPANY,

By THOMAS S. NOWELL, President.

NOWELL MINING & MILLING COMPANY,

By THOMAS S. NOWELL, President.”

At p. 596 (Tr. Case No. 1641) will be found the following ratification of the said Mines Securities Contract:

“We, the undersigned owners and holders of the number of bonds of the Berner’s Bay Mining & Milling Company set opposite our respective names, do hereby ratify and confirm the above agreement so far as relates to said bonds, and hereby agree to deposit the same in The International Trust Company of Boston, Mass., in accord-

ance with the terms of the agreement.

Dated February 7th, 1902.

HENRY ENDICOTT. 260.

WALLACE HACKETT. 27."

f. That this contract dated February 6th, 1902, expressly recognizes the absolute ownership of the Johnson Group (the mining claims in dispute) by the Nowell Mining & Milling Company, to which said contract Henry Endicott, intervenor, has signed his name as one of the parties thereto, and to which he, together with Wallace Hackett, representing 287 out of the 500 bonds of said Berner's Bay Company, has attached his express ratification.

g. That this Honorable Court will recall that in the above-entitled cause No. 1436 in this court it was alleged that the easement through the tunnel of the Berner's Bay Company acquired by the Nowell Mining & Milling Company was a fraud upon the Berner's Bay Company. It will be seen by reference to p. 587 (Tr. Case No. 1641) that this contract which has been expressly ratified by Henry Endicott, intervenor, reserves these rights "to the owners of what is known as the Johnson Mines, since organized and incorporated under the name of Nowell Mining & Milling Company." [231]

h. That this said Mines Securities Contract is dated February 6th, 1902, and yet this Henry Endicott, intervenor, testified under oath that the reason he did not sue on the unsigned typewritten memorandum, was, owing to the fact that it was lost and not found until 1900.

i. That this Mines Securities Contract is con-

clusive evidence of the falsity of said Henry Endicott's testimony. It proves that he had knowledge of the adverse ownership of the Nowell Mining & Milling Company; that he acquiesced therein; that his claim of fraud on the part of the Nowells is false; that he knew it to be false; and that he was practicing a willful and wicked deception upon a court of equity.

j. That the record at page 616 (Case No. 1641) reads as follows:

“Memorandum of an agreement entered into between the holders of the first mortgage bonds of the Berner's Bay Mining & Milling Company organized under the laws of the State of Maine, herein designated as parties of the first part; and Wallace Hackett of Portsmouth, N. H., Trustee, herein designated as party of the second part; and Thomas S. Nowell, Frederick D. Nowell, and Willis E. Nowell, all of Juneau, Alaska, parties hereto of the third part.”

That at page 619 (Tr. Case No. 1641) the contract provides as follows:

“but all of said properties shall be preserved in their integrity and together with the group of mines in Alaska contiguous to the said Berner's Bay property known as the Johnson group and organized into a corporation under the name of the Nowell Mining & Milling Company, which said Nowell Mining & Milling Company is the exclusive property of the parties of the third part and subject to no encumbrance, but free and clear of all indebtedness; said parties of the third part

hereby agree to add said Johnson properties above mentioned, to the properties of the Berner's Bay Company, so that the same may be formed into one corporation."

That at page 622 (Tr. Case No. 1641) the contract provides as follows:

"Third: On the payment of all the indebtedness herein provided the remaining portion of said twenty-five per cent (25%) of the capital stock shall become the property of the parties of the third part, [232] and said trustee is hereby authorized to convey the same accordingly,"

That at page 623 (Tr. Case No. 1641) the contract provides as follows:

"A part of the consideration of this contract being the conveyance of the Johnson properties, above described, to the proposed purchasing syndicate herein mentioned, by the parties of the third part."

That at p. 618 (Case No. 1641) the contract provides as follows:

"First: The bondholders will deposit their bonds with Wallace Hackett of Portsmouth, N. H., who will act as trustee for the purposes hereinafter described and issue his receipts for the bonds deposited with him. The acceptance of such receipts on the part of the bondholders shall constitute the assent of said bondholders to this contract and the terms thereof."

That this memorandum of agreement dated February 26th, 1903, should be read in connection with the circular letter to the bondholders of the Berner's

Bay Mining & Milling Company (Tr. Case No. 1641, p. #909 et seq.), dated at Portsmouth, N. H., March 31st, 1903, and signed by Wallace Hackett: This circular letter reads as follows p. 910 (Tr. Case No. 1641):

“Contiguous and adjoining the property of the Berner’s Bay Company is a group of mines known as the Johnson property and organized under the name of the ‘Nowell Mining & Milling Company.’ This Johnson property is free of indebtedness and has been prospected to an extent which warrants the belief that it is a very large and valuable piece of property, still it is undeveloped. This Johnson property is owned exclusively by Thomas S. Nowell and his two sons. By combining the Johnson property with those of the Berner’s Bay Company a condition may be obtained which will permit of very economical mining but involves the outlay of a large sum of money.”

That this contract was assented to by all the bondholders is proved by the testimony of John M. Graham (Tr. Case No. 1641, pp. 872-3); by the testimony of Wallace Hackett (Tr., p. 918, Case No. 1641), and by the testimony of Thomas S. Nowell (Tr., pp. 644-5, Case No. 1641), and Henry Endicott, intervenor, being a large bondholder, therefore assented to the terms of that memorandum of agreement which by its terms expressly [233] recognized the absolute Nowell title to the Johnson mines. This contract was assented to three years after the unsigned typewritten memorandum was found by him in 1900.

That we, therefore, find in the record of Appeal No. 1641, in this court, conclusive evidence of the fact that Henry Endicott, intervenor, has acquiesced in and acknowledged the rightfulness of the Nowell title to the said Johnson group up to and as late as February 26, 1903.

That this, we respectfully submit, is indisputable evidence that Henry Endicott, intervenor, has come into this court of equity upon a fictitious charge, deliberately made, of fraud, well knowing that it was false, and that it is also conclusive evidence of the fact that his testimony under oath to the effect that the Nowells had defrauded him was false and absolutely untrue.

Your petitioners further respectfully represent that there are other grounds for charging these complainants with false swearing and perpetrating a gross fraud upon a court of equity.

This Honorable Court will recall that in the petition relating to Decree and Mandate, submitted on August 3, 1908, in the above-entitled cause, it was represented by petitioners at p. 5 as follows:

“and also two letter-press copy-books of the year 1896, the personal property of Thomas S. Nowell, are not within the control of petitioners, but, as petitioners believe, are in the control of the reorganization committee and are material to the issues in this case.”

By referring to pp. 1725 and 26 (Tr. Case, No. 1641), it will be seen that Thomas S. Nowell decided not to have the Johnson mines deeded to the company “so as to be on the safe side.” The whole ex-

tract claimed to have been taken from a certain letter written to Willis E. Nowell by Thos. S. Nowell and dated July 17th, 1896, reads as follows:

“I propose to pay the Johnson drafts the coming week, so that if Fred can carry out my suggestion with Johnson beyond that and have the mines deeded to the company it will be all right, and if not, it will be all right, [234] because I shall make the payments and then the deeds can be made direct to the B. B. Co. after the payments are made. I am very glad that I decided not to have the Johnson mines deeded to the company so as to be on the safe side.”

From this extract it is plain to be seen that T. S. Nowell had not deeded the Johnson mines for prudential reasons, showing an entire absence of fraud charged.

At p. 1639-40 (Tr. Case No. 1641) another extract claimed to be taken from a letter dated at Boston August 11th, 1896, written by Thomas S. Nowell to F. D. Nowell, which said extract reads as follows:

“I wrote you yesterday in regard to what you had to say in regard to the Johnson properties. I hope to telegraph to the credit of Johnson to the Bank of British Columbia \$25,000 within the next week, and have them notify Johnson of the payment and have them return the draft should they still have it in their possession; otherwise, if it has been returned to Mr. Johnson, he can turn it over to you when you are advised of the payment, but you must protect it if it is necessary. I have answered you fully in regard to the Johnson mines

and when Willis received the papers showing the transaction I have made and that we really control over three-fifths of the entire Berner's Bay interests. In view of the liberal recognition that my friends have given me here, I think it will be unwise not to fulfill what I have already agreed to put into the company on the last deal. Mr. Plummer thinks that I am very mean in recognizing the people that have helped me to carry matters along and in view of this fact if I should do what you suggest in regard to the Johnson mines, why it might augment that sentiment here."

The extracts above cited were supposed to have been taken from these said two letter-press copy-books, the possession of which was acknowledged by Mr. Shackelford, attorney for complainants and intervenor and for the said reorganization committee in this cause.

It is to be noticed that these two supposed letters were not submitted in evidence, or shown to the witness in any way, but that these extracts were read by counsel and witness was asked if he remembered such letters. [235] It is submitted that such procedure is not entitled to be called producing evidence in court, otherwise counsel will be at liberty to manufacture evidence at pleasure. But even if said evidence were not open to this objection, it is plainly to be seen from these supposed extracts that Thomas S. Nowell had committed no fraud and that he did not intend to commit any fraud.

At pp. 2389-90 of the record of appeal No. 1641 in this Court, it will be seen that these said letter-

press copy-books are in the possession of Mr. Shackleford, one of the attorneys for complainants below, whereby the representation in said petition above referred to is shown to be true in fact. The method used to secure possession of these books is, *at last*, before this Court. (Case No. 1641 Tr., pp. 2389-90.)

Your petitioners further respectfully represent that these said letter-press copy-books contain indisputable and conclusive evidence of the fact that the charge of fraud alleged in the bill of complaint and petition of intervention in this cause is absolutely false and untrue.

That these said letter-press copy-books have been in the possession of Henry Endicott and his associates, the Corning-Gillespie-Fairchild Reorganization Committee since about, October, 1905, previously to the commencement of the above-entitled cause in the Court below, and, therefore, that this evidence of the falsity of their charges of fraud was perfectly well known to them at the time they instituted proceedings in the court below, but that they have willfully suppressed the said evidence, and that, in spite of their actual knowledge of the falsity of their allegations of fraud, they have persisted in their unblushing course of deception by means of which they have perpetrated a gross fraud, not only upon the United States District Court, at Juneau, Alaska, but also upon this United States Circuit Court of Appeals for the Ninth Circuit.

The accompanying affidavit of George M. Nowell makes oath to the fact that he has evidence in his

possession which will prove that these said letterpress copy-books contain evidence disproving the fraud as alleged by complainants and intervenor below. [236]

WHEREFORE, appellants, in order that complete justice may be done and that the stigma of fraudulent conduct may be removed from the good names of honest men, respectfully pray that this Honorable Court will be pleased to open up the decree of June 8, 1908, in this cause and declare the same void for fraud; or make an order that the United States District Court for Division Number One, Alaska, may be directed in the mandate of this Court to grant, upon a proper motion presented to said District Court, leave to defendants to take further evidence in this cause, for the purpose of proving said fraud upon the court, or that leave be granted in said mandate to said District Court to receive and entertain a motion for such leave; and that appellants may have such other and further relief as may be consistent with equity and good conscience and to your Honors may seem meet.

THOMAS S. NOWELL.

WILLIS E. NOWELL.

NOWELL MINING & MILLING COMPANY.

ALASKA NOWELL GOLD MINING COMPANY.

By GEORGE M. NOWELL,
Their Attorney.

I certify that in my opinion the evidence above referred to is material and proper and that this peti-

tion is not offered for the purpose of delay.

I also certify that the printed record consisting of 2695 pages in the appeal of George M. Nowell et al. vs. The International Trust Company, No. 1641 in this Honorable Court, was first received in hand by me at Omaha, Nebraska, on Saturday, October 31st, while en route from Boston to San Francisco to appear as counsel in said appeal, exactly one week before this petition is to be submitted, and I also certify that the tremendous length of said record has prevented me from preparing this petition before Friday, November 6th, 1908, or about twenty-four hours before submission to this Court.

I also certify that owing to the fact that your petitioners are not present at San Francisco, but are in Juneau, Alaska, I am unable to procure their written signatures to this said petition.

GEORGE M. NOWELL,

Of Counsel for Defendants-Appellants. [237]

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. 1436.

THOMAS S. NOWELL et al.,

Appellants,

vs.

JOHN C. McBRIDE et al.,

Appellees.

**Affidavit by George M. Nowell in Support of Petition
to Open Up Decree for Fraud of the Parties in
Procuring the Same [in C. C. A. No. 1436].**

State of California,

City and County of San Francisco,—ss.

George M. Nowell, being first duly sworn on oath,
deposes and says: That,

I am one of the attorneys for the appellants in the
above-entitled cause; that,

I am the identical George M. Nowell whose affi-
davit is to be found on pages 29, 30 and 31 of the
Petition Relating to Decree and Mandate filed herein,
in this court, on July 31st, 1908; that,

The said letters in said Petition Relating to De-
cree and Mandate named and described on page 30,
constitute the evidence by means of which it will be
proved that the appellees herein (complainants be-
low) before and during the trial of this cause below,
had actual knowledge of the absolute falsity of their
allegations of fraud against the defendants below;
that these said letters are the originals of the letters
which were copied into said letter-press copy-books;
that, [238]

The contents of the copies of the said original let-
ters contained in said letter-press copy-books, were
of a nature and of such import as to give conclusive
and indisputable notice of the fact that no fraud
had been committed by said Thomas S. Nowell or
by said William M. Payson, or by any other person
connected with the transaction in issue; that,

Said originals by being copied into said letter-

press copy-books afforded absolute and accurate knowledge that such charges of fraud as made by complainants and intervenors in this cause in the court below were absolutely false and that they had no foundation in fact; that,

These said original letters taken in connection with the other evidence mentioned and set forth in the accompanying Petition to Open Up Decree for Fraud of the Parties in procuring the same will, in the opinion of your affiant, offer conclusive proof of the deception and fraud that has been practiced upon the Federal Courts during the trial below, and the hearing of the appeal of this cause.

GEORGE M. NOWELL.

Subscribed and sworn to before me *this*

My commission expires July 3, 1909.

HUGH J. SIME,
Notary Public.

[Endorsed]: Filed Feb. 6, 1911. H. Shattuck,
Clerk. By H. Malone, Deputy. [239]

**Plaintiffs' Exhibit "H" [to Affidavit of George M.
Nowell].**

*United States Circuit Court of Appeals for the Ninth
Circuit.*

No. 1436.

THOMAS S. NOWELL et al.,

Appellants,

vs.

JOHN G. McBRIDE et al.,

Appellees.

Motion for Further Stay of Mandate [in C. C. A. No. 1436].

And now come appellants, by their attorney, and show the Court as follows:

I.

That on November 4, 1908, this Honorable Court granted in the above-entitled cause a stay of mandate for thirty days pending *certiorari* proceedings in the Supreme Court of the United States, which said stay expires December 4, 1908.

II.

That on November 7, 1908, appellants, by their attorney, presented a Petition to Open Up Decree for Fraud of the Parties in procuring the same, which said Petition was on that day filed in and now is a part of the record in the above-entitled cause.

III.

That this said petition charges the parties complainant with having brought suit against appellants in the Court below, wherein they (complainants) alleged gross fraud on the part of appellants-defendants, well knowing that said allegations of fraud were false. [240]

IV.

That Henry Endicott at the time he filed his petition of intervention knew that he had acquiesced in and expressly recognized the rightfulness of the title of appellants in and to the said Johnson Group (the subject matter of the suit), and that when he alleged fraud against appellants-defendants he well knew that said allegations were false, and absolutely untrue, and,

V.

That this said petition further represents that these parties complainants at the time they instituted said proceedings in the court below had in their possession evidence which was conclusive proof of the falsity of their charges.

VI.

That the said petition to open up decree for fraud of the parties in procuring the same cited evidence contained in the printed record of the appeal of George M. Nowell et al. vs. The International Trust Company et al., No. 1641 in this court, to substantiate said charges, contained in said petition, of fraud and deception practiced by said complainants-appellees in the above-entitled cause of Nowell et al. vs. McBride et al., No. 1436, not only upon said United States District Court at Juneau, Alaska, but also upon this United States Circuit Court of Appeals for the Ninth Circuit.

VII.

That at the time the undersigned, acting as counsel for appellants herein, presented said Petition to Open Up Decree for Fraud of the Parties in procuring the same, this Honorable Court said that, being an Appellate Court, it could not take any action in the matter, and suggested the proper course for appellants to pursue would be to institute proceedings in the United States District Court at Juneau, Alaska, for the purpose of arriving at an adjudication on the merits concerning said charges of fraud, and if established as true, to obtain a voidance of said decree. [241]

VIII.

That in accordance with this suggestion of this Honorable Court, the undersigned on the same day, viz., on November 7, 1908, sent forward by United States mail a copy of each of said petition and its accompanying affidavit to appellants' local attorneys at Juneau, Alaska, with written instructions to institute proceedings without delay in the District Court in accordance with the foregoing suggestion of this Honorable Court, but that at this place and date, i. e., Boston Mass., November 21, 1908, there has not yet elapsed sufficient time in which to receive an answer through the mails.

IX.

In view of the fact that appellants, by their attorney, have acted upon the said suggestion of this Honorable Court in instituting proceedings in the District Court to void for fraud the decree in the above-entitled cause, they are uncertain as to what they shall do concerning the *certiorari* proceedings in the United States Supreme Court. It is clear that, simultaneously to appear in the United States Supreme Court as petitioners for a writ of *certiorari* and in the United States District Court at Juneau, Alaska, as petitioners in proceedings instituted for the specific purpose of voiding for fraud the identical decree concerning which appellants have brought said *certiorari* proceedings, would involve a serious inconsistency in conduct, and therefore appellants find themselves in a most difficult situation owing to the fact that the motion for a stay of mandate pending *certiorari* proceedings was granted two or three

days previously to the discovery by the undersigned of the facts in the record of the appeal of George M. Nowell et al. vs. The International Trust Company et al., No. 1641, upon which facts are based appellants' said Petition to Open Up Decree for Fraud of the Parties in procuring the same. [242]

X.

The undersigned, attorney for appellants in the above-entitled cause, hereby assures this Honorable Court that he has, as above stated, taken the proper and necessary steps by sending instructions to appellants' local attorneys at Juneau, to institute the said proceedings in the District Court as soon as is consistent with a proper and adequate presentation of the same; and he further says that as soon as he has completed appellants' brief in the appeal of George M. Nowell et al. vs. The International Trust Company et al., No. 1641, he intends, if possible, to arrange his business engagements so as to permit of his going to Juneau, Alaska, for the express purpose of prosecuting with all possible vigor and despatch said proceedings to avoid said decree.

XI.

That the undersigned, on or about November 24, 1908, intends going to Washington, District of Columbia, to consult with the Clerk of the United States Supreme Court concerning the matters herein contained and set forth.

WHEREFORE, appellants, by their attorney, respectfully pray this Honorable Court to set aside the order of November 4, 1908, in the above-entitled cause and on account of the present status of the

case in its place to grant a stay of mandate pending proceedings in the District Court to set aside said decree for fraud of the parties in procuring the same, or until further order of this Court.

GEORGE M. NOWELL,

Attorney for Appellants.

Boston, Massachusetts, November 21, 1908.

I hereby certify that the foregoing motion is not made for the purpose of delay, but that it is made in good faith, fully believing that the said charges contained in said petition filed herein on November 7, 1908, of fraud on the part of complainants and intervenor below in procuring the said decree are true in every respect, and also fully believing that a [243] judicial inquiry into the truth of said charges of fraud will establish their truth in fact, and will therefore result in a voidance of said decree in the above-entitled cause.

GEORGE M. NOWELL,

Attorney for Appellants.

[Endorsed]: Filed Feb. 6, 1911. H. Shattuck, Clerk. By H. Malone, Deputy. [244]

In the United States District Court for Alaska, Division Number One, at Juneau.

No. 717-A.

THOMAS S. NOWELL, WILLIS E. NOWELL,
THE NOWELL MINING AND MILL-
ING COMPANY, a Corporation, and the
ALASKA NOWELL GOLD MINING COM-
PANY, a Corporation,

Plaintiffs,

vs.

NATIONAL TRUST COMPANY, a Corporation,
HENRY ENDICOTT, WILLIAM ENDI-
COTT, WALLACE HACKETT, C. R.
CORNING, R. McM. GILLESPIE and S. W.
FAIRCHILD,

Defendants.

Demurrer to Bill of Complaint.

Come now the above-named defendants and appearing in the above-entitled cause demur to plaintiffs' third amended bill of complaint, and for grounds of demurrer allege:

I.

That this Court has no jurisdiction of the subject matter of this action.

II.

That the plaintiffs have no legal capacity to sue.

III.

That there is another action pending between the same parties for the same cause.

IV.

That there is a defect of parties plaintiff and defendant.

V.

That several causes of action have been improperly united.

VI.

That it appears from said complaint that the same does not state facts sufficient to constitute a cause of action in favor of the plaintiffs and against the defendants. [245]

VII.

That it appears from said complaint that the same does not state facts sufficient to constitute an equitable cause of action in favor of plaintiffs and against the defendants, and does not state facts sufficient to entitle the plaintiffs to any equitable relief whatever.

VIII.

That it appears from said complaint that the action has not been commenced within the time limited by this Code or the law, and the Court has no jurisdiction of the subject of said action, for the reason that this is a suit in equity brought to set aside a decree duly and regularly made and entered on the ground of fraud practiced in the trial and on the grounds of perjured testimony; that the term of Court at which said decree was made and entered had long expired before the commencement of this suit.

L. P. SHACKLEFORD,

OSTRANDER & DONOHUE,

Attorneys for Defendants. [246]

United States of America,
District of Alaska,
Third Division,—ss.

I, T. J. Donohoe, being first duly sworn, depose and say:

That I am one of the attorneys for the above-named defendants; that on the 29th day of March, 1911, I served a copy of the foregoing demurrer on George M. Nowell, attorney of record for the above-named plaintiffs, by depositing a true and correct copy of the same, inclosed in an envelope, postage prepaid and addressed "George M. Nowell, Juneau, Alaska," in the United States postoffice at Valdez, Alaska; that there is regular communication between Valdez, Alaska, and Juneau, Alaska, by the United States mail, and there is a United States postoffice at Juneau, Alaska; that I also made service of the foregoing demurrer by depositing with the Clerk of the District Court for the Territory of Alaska, Third Division, at Valdez, a true and correct copy of the same for the attorney of record for plaintiffs in the above-entitled cause, in accordance with the rules of this Court.

[Notarial Seal]

T. J. DONOHOE.

Subscribed and sworn to before me this 29th day of March, 1911.

J. H. MURRAY,

Notary Public in and for the District of Alaska, Residing at Valdez.

[Endorsed]: "No. 717-A. In the District Court for the Territory of Alaska, Third Division.

Thomas S. Nowell et al., Plaintiffs, vs. National Trust Company, a corporation, et al., Defendants. Demurrer to Bill of Complaint. Filed *nunc pro tunc* as March 21, [247] 1911, on April 14, 1911. E. W. Pettit, Clerk." [248]

*In the United States District Court for Alaska,
Division Number One, at Juneau.*

No. 717-A.

THOMAS S. NOWELL, WILLIS E. NOWELL,
THE NOWELL MINING AND MILLING
COMPANY, a Corporation, and THE
ALASKA NOWELL GOLD MINING COM-
PANY, a Corporation,

Plaintiffs,

vs.

INTERNATIONAL TRUST COMPANY, a Cor-
poration, HENRY ENDICOTT, WILLIAM
ENDICOTT, WALLACE HACKETT, C. R.
CORNING, R. McM. GILLESPIE, and S. W.
FAIRCHILD,

Defendants.

Decree.

This cause coming on to be heard upon the demurrer of the defendants herein to the Third Amended Bill of Complaint of the plaintiffs herein, which said Bill was filed in this court on the 6th of February, 1911, which said demurrer is marked on the files of this court filed *nunc pro tunc* March 21, 1911, on April 14, 1911, and is signed L. P. Shack-

ford and Ostrander & Donohue, attorneys for defendants; and the plaintiffs herein being represented by George M. Nowell, Esq., attorney for plaintiffs, and the defendants being represented by L. P. Shackelford, Esq., and the defendants through their attorney presenting to the Court the printed record of the Circuit Court of Appeals in the case of Nowell vs. McBride, being numbered Cause No. 1436, in the United States Circuit Court of Appeals for the Ninth Circuit, and being the same cause as 519-A in the United States District Court for the District of Alaska, Division No. 1, known and entitled there as J. C. McBride, Plaintiff, vs. Thomas S. Nowell et al., Defendants;

And the defendants further asking the Court to take particular notice of pages 346, 371, and 372 of the said printed [249] record; plaintiff objecting thereto—objection overruled—record admitted and the plaintiffs asking the said Court to take particular notice of pages 350, 351, 352 and 353 of said printed record in connection with the hearing on said demurrer; and the demurrer having been duly argued, the Court overruled the grounds for demurrer set out in paragraphs one, two, three, four and five of said demurrer, sustained the demurrer on the ground that the complaint did not state facts sufficient to constitute a cause of action as set out in paragraphs six and seven of said demurrer, and as to the ground for demurrer set out in paragraph eight of said demurrer the Court makes no ruling whatever, and the Court further announced that the Third Amended Bill of Complaint had been filed herein

with permission of the Court upon a Motion for Leave to Amend filed by plaintiffs in the above-entitled cause on the thirty-first day of December, 1910.

WHEREFORE, upon the Third Amended Bill of Complaint and the demurrer thereto

IT IS ORDERED, ADJUDGED AND DECREED:

1. That the demurrer to the plaintiff's Bill of Complaint be overruled as to paragraphs one, two three, four and five, and sustained as to paragraphs six and seven, and that no ruling is made on paragraph 8th of said demurrer.

Plaintiffs standing upon their third amended Bill of Complaint—it is further decreed

2. That the plaintiffs' Third Amended Bill and suit be dismissed; and,

3. That the defendants herein have and recover of and from the plaintiffs their costs and disbursements herein laid out and expended.

Done in open court this, the fifteenth day of May, 1911.

EDWARD E. CUSHMAN,
District Judge. [250]

To all of which the plaintiffs by their attorney duly excepted, and more especially to the admission of pages of printed record offered by defts.

EDWARD E. CUSHMAN,
District Judge.

[Endorsed]: "Original. No. 717-A. In the United States District Court for Alaska, Division Number One, at Juneau. Thomas S. Nowell et al., Plaintiffs, vs. International Trust Company et al.,

Defendants. Decree. Filed May 15, 1911. E. W. Pettit, Clerk." [251]

*In the United States District Court for the District
of Alaska, Division No. One, at Juneau.*

No. 717-A.

THOS. S. NOWELL, WILLIS E. NOWELL, THE
NOWELL MINING AND MILLING CO.,
a Corporation, and the ALASKA NOWELL
GOLD MINING CO., a Corporation,
Plaintiffs,

vs.

JOHN C. McBRIDE, as Receiver of the BERNER'S
BAY MINING AND MILLING CO.,
HENRY ENDICOTT, WILLIAM ENDI-
COTT, WALLACE HACKETT, C. R.
CORNING, R. McM. GILLESPIE and S. W.
FAIRCHILD,

Defendants.

Order of Substitution.

Now, on this 7th day of February, 1910, this matter being regularly before the court for hearing, and all of the plaintiffs in the above-entitled cause appearing and being represented by their attorneys, George M. Nowell, J. F. Malony and Messrs. Malony & Cobb, and the defendant John C. McBride, as Receiver, appearing and being represented by his attorney, William A. Barnhill, Esq., and all of the other defendants in the above-entitled cause appearing and being represented by their attorney, L. P. Shackelford, Esq., and

WHEREAS, complaint was filed in the above-entitled cause in this court on the 2d day of March, 1909, against John C. McBride, as Receiver, and the other defendants above named, and

WHEREAS at said time said defendant John C. McBride, as Receiver, was in possession of and held the legal title to all of the property involved in the above-entitled cause; and

WHEREAS said defendant John C. McBride, as Receiver, filed in said cause in this court a motion praying that the International Trust Co., a corporation, of Boston, Mass., be substituted as defendant in the above-entitled cause in his place and stead, stating as reasons therefor that he has transferred all right and interest and title to said International Trust Co., and bases said motion, among other things, on the records, files and proceedings in cause [252] Nos. 603 and 536-A Consolidated, of this court, at Juneau, and

WHEREAS, all of the property involved in the above-entitled cause, and all right, title and interest of said defendant John C. McBride thereto, was on the 7th day of February, 1910, transferred by Receiver's deed, made, executed and delivered to the said International Trust Co., a corporation, by said defendant John C. McBride, as Receiver; and

WHEREAS, said defendant John C. McBride, as Receiver, has delivered possession of all of said property to said International Trust Co.; and

WHEREAS said defendant John C. McBride has no further interest in said above-entitled cause, and there being no objection to the substitution prayed for in said motion

NOW, THEREFORE, in consideration of the premises, and for the reasons stated in the motion herein referred to, and good cause shown therefor, and the Court being fully advised in the premises,

IT IS ORDERED that the International Trust Co., a corporation, of Boston, Mass., be and it is hereby substituted as one of the defendants in the above-entitled cause in the place and stead of the above-named defendant John C. McBride, as Receiver of the Berner's Bay Mining and Milling Co., a corporation.

IT IS FURTHER ORDERED that from the date of this order the above-entitled action be continued by and in the name of the said International Trust Co., a corporation, instead of John C. McBride, as Receiver, as one of the defendants therein, without prejudice to the proceedings already had.

IT IS FURTHER ORDERED that from the date of this order no further proceedings shall be prosecuted in the above-entitled action against said John C. McBride, as Receiver.

IT IS FURTHER ORDERED that from the date of this order all further proceedings in the above-entitled cause against the defendants therein shall be in the name of the said International Trust Co., a corporation, as one of the defendants instead of John [253] C. McBride, as Receiver of the Berner's Bay Mining and Milling Co., and the other defendants.

And IT IS FURTHER ORDERED that the said International Trust Co., a corporation, have the period of 30 days after filing of plaintiffs' Amended Bill of Complaint from the date of this order in which

to plead, answer or demur in the above-entitled action or to take such other proceedings as it may be advised.

Done in open court this 7th day of February, 1910.

EDWARD E. CUSHMAN,

Judge.

The International Trust Co., a corporation of Boston, Mass., hereby consents to be substituted as a defendant in the above-entitled action in the place and stead of John C. McBride as Receiver of the Berner's Bay Mining and Milling Co., a corporation, and hereby consents that the foregoing order be entered in said matter as submitted.

INTERNATIONAL TRUST CO.

By L. P. SHACKLEFORD,

Attorney for International Trust Co.

[Endorsed]: Form No. 680. Original. No. 717-A. In the District Court of the United States for the Div. One of Alaska. Thomas S. Nowell et al. vs. John C. McBride, as Receiver et al. Order of Substitution. Filed Feb. 7, 1910. H. Shattuck, Clerk. By E. W. Pettit, Deputy. Wm. A. Barnhill, Attorney for Receiver, John C. McBride. [254]

*In the District Court for the District of Alaska,
Division No. One.*

No. 717-A.

THOMAS S. NOWELL, WILLIS E. NOWELL,
THE NOWELL MINING & MILLING
COMPANY, a Corporation, and THE
ALASKA NOWELL GOLD MINING COM-
PANY, a Corporation,

Plaintiffs,

vs.

THE INTERNATIONAL TRUST COMPANY,
a Corporation Substituted for J. C. Mc-
BRIDE, Recvr., etc., a Corporation, HENRY
ENDICOTT, WILLIAM ENDICOTT,
WALLACE HACKETT, C. S. CORNING,
R. McM. GILLESPIE and S. W. FAIR-
CHILD,

Defendants.

Petition for Allowance of Appeal.

The above-named plaintiffs in the above-entitled and numbered cause feeling themselves aggrieved by the judgment and decree rendered against them in said cause, on the 15th day of May, 1911, pray the Court to allow them an appeal from the said decree and judgment to the United States Circuit Court of Appeals for the 9th Circuit, and to fix in an order al-

lowing said appeal the amount of the bond required for costs.

GEORGE M. NOWELL,

R. W. JENNINGS,

JOHN P. HARTMAN,

Attorneys for Plaintiffs.

Service accepted Mch. 18/12.

L. P. SHACKLEFORD,

By W. S. BAYLESS,

Attys. for Defdt. [255]

[Endorsed]: "No. 717-A. In the District Court for Alaska, Division No. 1, at Juneau. Thomas S. Nowell, Willis E. Nowell, Nowell Mining & Milling Co., a Corp., Alaska Nowell Gold Mining Co., a Corp., Plaintiff, vs. International Trust Co., a Corp., Henry Endicott, Wm. Endicott, Wallace Hackett, C. S. Corning, R. McM. Gillespie and S. W. Fairchild, Defendants. Filed Mar. 18, 1912. E. W. Pettit, Clerk. By H. Malone, Deputy. Petition for Allowance of Appeal. R. W. Jennings, Attorney for ————
———. Office: Juneau, Alaska, Lewis Block."

[256]

*In the District Court for the District of Alaska,
Division No. One.*

No. 717-A.

THOMAS S. NOWELL, WILLIS E. NOWELL,
THE NOWELL MINING & MILLING
COMPANY, a Corporation, and THE
ALASKA NOWELL GOLD MINING COM-
PANY,

Plaintiffs,

vs.

THE INTERNATIONAL TRUST COMPANY, a
Corporation, HENRY ENDICOTT, WILL-
IAM ENDICOTT, WALLACE HACKETT,
C. S. CORNING, R. McM. GILLESPIE and
S. W. FAIRCHILD,

Defendants.

Assignment of Errors.

Plaintiffs assign as errors, upon which they will rely in the United States Circuit Court of Appeals for reversal of the decree and judgment of the trial court, the following:

I.

The trial court erred in holding that the third amended complaint herein does not state facts sufficient to constitute a cause of action, nor facts sufficient to entitle plaintiffs to the relief sought, and in sustaining the demurrer to said amended complaint.

II.

The trial court erred in rendering and entering its

decree dismissing this action and giving judgment against the plaintiffs for costs.

GEORGE M. NOWELL,
R. W. JENNINGS,
JOHN P. HARTMAN,

Attorneys for Plaintiffs.

Copy received on service accepted, this 18th day of March, 1912.

L. P. SHACKLEFORD,
By W. S. BAYLESS,
Attorneys for Defendants. [257]

[Endorsed]: "No. 717-A. In the District Court for Alaska, Division No. 1, at Juneau. Thomas S. Nowell, Willis E. Nowell, Nowell Mining & Milling Co., a Corp., Alaska Nowell Gold Mining Co., a Corp., Plaintiff, vs. International Trust Co., Henry Endicott, William Endicott, Wallace Hackett, C. S. Corning, R. McM. Gillespie and S. W. Fairchild, Defendants. Assignment of Errors. Filed Mar. 18, 1912. E. W. Pettit, Clerk. By H. Malone, Deputy. R. W. Jennings, Attorney for Pltffs. Office: Juneau, Alaska, Lewis Block." [258]

*In the District Court for the District of Alaska,
Division No. One.*

717-A.

THOMAS S. NOWELL, WILLIS E. NOWELL,
THE NOWELL MINING & MILLING
COMPANY, a Corporation, and THE
ALASKA NOWELL GOLD MINING COM-
PANY, a Corporation,

Plaintiffs,

vs.

THE INTERNATIONAL TRUST COMPANY, a
Corporation, HENRY ENDICOTT, WILL-
IAM ENDICOTT, WALLACE HACKETT,
C. S. CORNING, R. McM. GILLESPIE and
S. W. FAIRCHILD,

Defendants.

Order Allowing Appeal.

This cause came on to be heard upon the petition of the plaintiffs herein, for an allowance of the appeal from the decree and judgment rendered herein on the 15th day of May, 1911, and the Court having heard said petition and the assignments of error having been filed herein,

IT IS ORDERED that the said appeal be and the same is hereby allowed, and the plaintiffs and appellants shall give a cost bond on appeal for the sum of Two Hundred and Fifty (\$250) Dollars.

Dated this 26th day of March, 1912.

EDWARD E. CUSHMAN,

Judge.

Entered Court Journal No. I, page 218.

[Endorsed]: No. 717-A. In the District Court for Alaska, Division No. 1, at Juneau, Thomas S. Nowell, Willis E. Nowell, Nowell Mining & Milling Co., Alaska Nowell Gold Mining Co., a Corp., Plaintiff, vs. International Trust Co., a Corp., Henry Endicott, Wm. Endicott, Wallace Hackett, C. S. Corning, R. McM. Gillespie and S. W. Fairchild, Defendant. Order Allowing Appeal. Filed Mar. 30, 1912. E. W. Pettit, Clerk. By ———, Deputy. R. W. Jennings, Attorney for Pltffs. Office, Juneau, Alaska, Lewis Block. [259]

*In the District Court for the District of Alaska,
Division No. One.*

No. 717-A.

THOMAS S. NOWELL, WILLIS E. NOWELL,
THE NOWEL MINING & MILLING COM-
PANY, a Corporation, and THE ALASKA
NOWELL GOLD MINING COMPANY, a
Corporation,

Plaintiffs,

vs.

THE INTERNATIONAL TRUST COMPANY, a
Corporation, HENRY ENDICOTT, WILL-
IAM ENDICOTT, WALLACE HACKETT,
C. S. CORNING, R. McM. GILLESPIE and
S. W. FAIRCHILD,

Defendants.

Citation [on Appeal—Filed Mar. 30, 1912].

The President of the United States to The International Trust Company, a Corporation, Henry Endicott, William Endicott, Wallace Hackett, C. S. Corning, R. McM. Gillespie and S. W. Fairchild, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the 9th Circuit, to be holden at the City of San Francisco, California, within thirty (30) days from the date hereof, pursuant to an order allowing an appeal entered in the Clerk's Office for the District of Alaska, Division No. One, in that certain suit No. 717-A, wherein Thomas S. Nowell, Willis E. Nowell, The Nowell Mining & Milling Company, a Corporation, and the Alaska Nowell Gold Mining Company, a Corporation, are plaintiffs and appellants, and the International Trust Company, a Corporation, Henry Endicott, William Endicott, Wallace Hackett, C. S. Corning, R. McM. Gillespie and S. W. Fairchild, are defendants and appellees, to show cause, if any there be, why the decree of dismissal of said cause and judgment against plaintiffs [260] for costs should not be corrected and why speeded justice should not be done to the parties in that behalf.

Witness Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this 18th day of March, 1912.

EDWARD E. CUSHMAN,
Judge.

Service of the above Citation is admitted to have been made by a copy thereof, this 18th day of March, 1912.

L. P. SHACKLEFORD,

By _____,

Attorneys for Defendants.

Entered Court Journal No. I, pages 218 & 219.

[261]

[Endorsed]: No. 717-A. In the District Court for Alaska, Division No. 1, at Juneau. Thomas S. Nowell, Willis E. Nowell, Nowell Mining and Milling Co., a Corp., and Alaska Nowell Gold Mining Company, a Corp., Plaintiffs, vs. International Trust Co., a Corp., Henry Endicott, Wm. Endicott, Wallace Hackett, C. S. Corning, R. McM. Gillespie and S. W. Fairchild, Defendants. Citation. Filed Mar. 30, 1912. E. W. Pettit, Clerk. By _____, Deputy. [262]

*In the District Court for the District of Alaska,
Division No. One.*

No. 717-A.

THOMAS S. NOWELL, WILLIS E. NOWELL,
THE NOWEL MINING & MILLING COM-
PANY, a Corporation, and THE ALASKA
NOWELL GOLD MINING COMPANY, a
Corporation,

Plaintiffs,

vs.

THE INTERNATIONAL TRUST COMPANY, a
Corporation, HENRY ENDICOTT, WILL-

IAM ENDICOTT, WALLACE HACKETT,
C. S. CORNING, R. McM. GILLESPIE and
S. W. FAIRCHILD,

Defendants.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS, that we, Thomas S. Nowell, Willis E. Nowell, The Nowell Mining & Milling Company, a Corporation, and the Alaska Nowell Gold Mining Company, a Corporation, the plaintiffs in the above-entitled cause, as principals, and James T. Barron, and J. W. Rummell, as sureties, are held and firmly bound unto the International Trust Company, a corporation, Henry Endicott, William Endicott, C. R. Corning, Wallace Hackett, R. McM. Gillespie and S. W. Fairchild, above named defendants, in the full and just sum of Two Hundred and Fifty (\$250) Dollars, to be paid to the said defendants, their executors, administrators or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 18th day of March, 1912.

WHEREAS, lately at a session of the District Court [263] for the District of Alaska, Division No. One, in a suit pending in said court between the above-named plaintiffs and the above-named defendants, a decree and judgment was rendered in said cause, dismissing said cause with costs, against the above-named plaintiffs; and

WHEREAS, said plaintiffs have sustained from

said court an order allowing an appeal to the United States Circuit Court of Appeals for the 9th Circuit, to reverse the aforesaid decree and judgment rendered on the — day of May, 1911, and a Citation directing the above-named defendants and appellees, is about to be issued citing and admonishing them to appear at the United States Circuit Court of Appeals for the 9th Circuit, to be holden at San Francisco, California.

Now, the condition of the above obligation is such that if the above-named plaintiffs shall prosecute said appeal to effect and shall answer all costs which shall be awarded against them if they fail to make good their plea, then the above obligation to be null and void, otherwise it shall remain in full force and virtue.

THOMAS S. NOWELL,
WILLIS E. NOWELL,
THE NOWELL MINING & MILLING
COMPANY, a Corporation,
THE ALASKA NOWELL GOLD MINING
COMPANY, a Corporation,

Plaintiffs.

By R. W. JENNINGS,
Their Attorney.

JAS. T. BARRON.
J. W. RUMMEL.

Approved as to form and as to sufficiency of the sureties this 18th day of March, 1912.

EDWARD E. CUSHMAN,
Judge.

O. K. as to sufficiency of sureties.

LYONS, Judge. [264]

[Endorsed]: No. 717-A. In the District Court for Alaska, Division No. 1, at Juneau. Thomas S. Nowell, Willis E. Nowell, Nowell Mining & Milling Co., a Corporation, and Alaska Nowell Gold Mining Co., Plaintiffs, vs. The International Trust Co., a Corp., Henry Endicott, Wm. Endicott, Wallace Hackett, C. S. Corning, R. McM. Gillespie and S. W. Fairchild, Defendants. Bond on Appeal. Filed Mar. 30, 1912. E. W. Pettit, Clerk. By———, Deputy. R. W. Jennings, Attorney for Plaintiff. Office: Juneau, Alaska, Lewis Block. [265]

*In the District Court for the District of Alaska,
Division No. One.*

No. 717-A.

THOMAS S. NOWELL, WILLIS E. NOWELL,
THE NOWELL MINING & MILLING
COMPANY, a Corporation, and the ALASKA
NOWELL GOLD MINING COMPANY, a
Corporation,

Plaintiffs,

vs.

THE INTERNATIONAL TRUST COMPANY, a
Corporation, HENRY ENDICOTT, WILL-
IAM ENDICOTT, WALLACE HACKETT,
C. S. CORNING, R. McM. GILLESPIE and
S. W. FAIRCHILD,

Defendants.

Order Extending Time to File Transcript.

Upon application of counsel for plaintiffs herein,
and good cause having been shown, and counsel for

defendants herein consenting:

IT IS ORDERED that the time for filing the transcript on appeal of the records herein be and the same is hereby extended to August 1st, 1912.

Dated, March 18th, 1912.

EDWARD E. CUSHMAN,

Judge.

Entered Court Journal No. 1, page 219.

[Endorsed]: No. 717-A. In the District Court for Alaska, Division No. 1, at Juneau. Thomas S. Nowell, Willis E. Nowell, The Nowell Mining & Milling Company, a Corp., and the Alaska Nowell Gold Mining Company, Plaintiffs, vs. International Trust Co., a Corporation, Henry Endicott, Wm. Endicott, Wallace Hackett, C. S. Corning, R. McM. Gillespie and S. W. Fairchild, Defendants. Order Extending Time to File Transcript. Filed Mar. 30, 1912. E. W. Pettit, Clerk. By _____, Deputy. R. W. Jennings, Attorney for Pltff. Office: Juneau, Alaska, Lewis Block. [266]

*In the District Court for the District of Alaska,
Division No. One.*

No. 717-A.

THOMAS S. NOWELL, WILLIS E. NOWELL,
THE NOWELL MINING & MILLING
COMPANY, a Corporation, and THE
ALASKA NOWELL GOLD MINING COM-
PANY, a Corporation,

Plaintiffs,

vs.

THE INTERNATIONAL TRUST COMPANY,
a Corporation, HENRY ENDICOTT, WILLIAM
ENDICOTT, WALLACE HACKETT,
C. S. CORNING, R. McM. GILLESPIE and
S. W. FAIRCHILD,

Defendants.

Citation [on Appeal—Filed May 3, 1912].

The President of the United States to The International Trust Company, a Corporation, Henry Endicott, William Endicott, Wallace Hackett, C. S. Corning, R. McM. Gillespie and S. W. Fairchild, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the 9th Circuit, to be holden at the city of San Francisco, California, within thirty (30) days from the date hereof, pursuant to an order allowing an appeal entered in the Clerk's Office for the District of Alaska, Division No. One, in that certain suit No. 717-A, wherein Thomas S. Nowell, Willis E. Nowell, The Nowell Mining & Milling Company, a Corporation, and the Alaska Nowell Gold Mining Company, a Corporation, are plaintiffs and appellants, and the International Trust Company, a Corporation, Henry Endicott, William Endicott, Wallace Hackett, C. S. Corning, R. McM. Gillespie and S. W. Fairchild, are defendants and appellees, to show cause, if any there be, why the decree of dismissal of said cause and judgment against plaintiffs [267] for costs should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness Honorable EDWARD DOUGLASS
WHITE, Chief Justice of the Supreme Court of the
United States, this 3d day of May, 1912.

THOMAS R. LYONS,
Judge. [268]

United States of America,
District of Alaska,
Division No. 1,—ss.

I hereby certify that I received the within Citation on the 3d day of May, 1912, at Juneau, Alaska, and that I served the same on the 3d day of May, 1912, at Juneau, Alaska, on L. P. Shackelford, attorney for defendants herein, by then and there delivering to and leaving with W. S. Bayless, at the office of said Shackelford, in Juneau, Alaska, a full, true and correct copy of said Citation, he, said Shackelford, being then and there absent from the city of Juneau, and said W. S. Bayless being then and there in charge of said office, he, said W. S. Bayless, being then and there the law partner of said Shackelford and being over twenty-one years of age.

Dated at Juneau, Alaska, May 3, 1912.

H. L. FAULKNER,
United States Marshal,
By Hector McLean,
Office Deputy.

MARSHAL'S FEES:

One service.....\$3.00

Paid by R. W. JENNINGS.

[Endorsed]: No. 717-A. In the District Court for Alaska, Div. No. 1, at Juneau. Thomas S. Nowell, Willis E. Nowell, Nowell Mining & Milling

Co., a Corporation, and Alaska Nowell Gold Mining Company, a Corporation, Plaintiffs, vs. International Trust Co., a Corporation, Henry Endicott, Wm. Endicott, Wallace Hackett, C. S. Corning, R. McM. Gillespie and S. W. Fairchild, Defendants. Citation. Filed May 3, 1912. E. W. Pettit, Clerk. By H. Malone, Deputy. [269]

*In the District Court for the District of Alaska,
Division No. 1, at Juneau.*

No. 717-A.

THOMAS S. NOWELL, WILLIS E. NOWELL,
THE NOWELL MINING AND MILLING
COMPANY, a Corporation, and THE
ALASKA NOWELL GOLD MINING COM-
PANY, a Corporation,

Plaintiffs and Appellants,

vs.

INTERNATIONAL TRUST COMPANY, a Cor-
poration, HENRY ENDICOTT, WILLIAM
ENDICOTT, WALLACE HACKETT, C. R.
CORNING, R. McM. GILLESPIE, and S.
W. FAIRCHILD.

Defendants and Appellees.

**Certificate [of Clerk U. S. District Court to Tran-
script of Record, etc.].**

I, E. W. Pettit, Clerk of the District Court for the District of Alaska, Division No. 1, do hereby certify that the foregoing and hereto attached two hundred and sixty-nine pages of matter numbered from one to two hundred and sixty-nine, both inclu-

sive, constitute a full, true and complete record, and the whole thereof, on appeal, as requested in the praecipe of the appellant, filed herein and made a part hereof, in Cause No. 717-A, entitled Thomas S. Nowell, Willis E. Nowell, The Nowell Mining and Milling Company, a Corporation, and The Alaska Nowell Gold Mining Company, a Corporation, Plaintiffs and Appellants, vs. International Trust Company, a Corporation, Henry Endicott, William Endicott, Wallace Hackett, C. R. Corning, R. McM. Gillespie, and S. W. Fairchild, Defendants and Appellees.

I do further certify that the said record is by virtue of the Order Allowing Appeal and the Citations issued herein and made a part hereof, and the return in accordance therewith.

I do further certify that said record has been prepared by me in my office, and the cost of preparation examination and certificate, amounting to One Hundred Twenty-two and 15/100 Dollars (\$122.15), has been paid to me by R. W. Jennings, Esquire, Attorney for Appellants.

IN WITNESS WHEREOF I have hereunto set my hand and the official seal of the above-entitled court this 7th day of May, A. D. 1912.

[Seal]

E. W. PETTIT,

Clerk of District Court, Dist. of Alaska, Division
No. 1.

By J. J. Clarke,
Deputy.

[Endorsed]: No. 2141. United States Circuit Court of Appeals for the Ninth Circuit. Thomas S. Nowell, Willis E. Nowell, The Nowell Mining & Milling Company, a Corporation, and The Alaska Nowell Gold Mining Company, a Corporation, Appellants, vs. The International Trust Company, a Corporation, Henry Endicott, William Endicott, Wallace Hackett, C. S. Corning, R. McM. Gillespie and S. W. Fairchild, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the District of Alaska, Division No. 1.

Filed May 13, 1912.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

No. 2141.

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

THOMAS S. NOWELL, WILLIS E. NOWELL,
THE NOWELL MINING AND MILLING
COMPANY (a Corporation), and the ALASKA
NOWELL GOLD MINING COMPANY (a Cor-
poration),

Appellants,

vs.

INTERNATIONAL TRUST COMPANY (a Corpo-
ration), HENRY ENDICOTT, WILLIAM
ENDICOTT, WALLACE HACKETT, C. R.
CORNING, R. McM. GILLESPIE, and S. W.
FAIRCHILD,

Appellees.

Upon Appeal from the United States District
Court for the District of Alaska,
Division No. 1.

BRIEF OF APPELLANTS.

JOHN P. HARTMAN,
GEORGE M. NOWELL,
Attorneys for Appellants.

FILED

OCT. 8 1919

No. 2141.

**IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.**

THOMAS S. NOWELL, WILLIS E. NOWELL,
THE NOWELL MINING AND MILLING
COMPANY (a Corporation), and the ALASKA
NOWELL GOLD MINING COMPANY (a Cor-
poration),

Appellants,

vs.

INTERNATIONAL TRUST COMPANY (a Corpo-
ration), HENRY ENDICOTT, WILLIAM
ENDICOTT, WALLACE HACKETT, C. R.
CORNING, R. McM. GILLESPIE, and S. W.
FAIRCHILD,

Appellees.

**Upon Appeal from the United States District
Court for the District of Alaska,
Division No. 1.**

BRIEF OF APPELLANTS.

JOHN P. HARTMAN,
GEORGE M. NOWELL,
Attorneys for Appellants.

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT,

THOMAS S. NOWELL, WILLIS E. NOWELL,
THE NOWELL MINING & MILLING COM-
PANY, a Corporation, and the ALASKA
NOWELL GOLD MINING COMPANY, a Cor-
poration,

Appellants,

vs.

INTERNATIONAL TRUST COMPANY, a Cor-
poration, HENRY ENDICOTT, WILLIAM
ENDICOTT, WALLACE HACKETT, C. R.
CORNING, R. McM. GILLESPIE, and
S. W. FAIRCHILD,

Appellees.

No. 2141

Upon Appeal from the United States District Court for
the District of Alaska, Division Number One.

BRIEF OF APPELLANTS.

STATEMENT OF FACTS.

This is an appeal from a decree sustaining a demurrer to a bill to set aside a decree in a former suit for fraud in obtaining the same.

The appeal of the original suit is entitled *Nowell et al. v. McBride et al.*, and is reported in 162 Federal Reporter, 432, which suit will be hereinafter referred to as the "old suit." The International Trust Company has been substituted as defendant for Receiver McBride. (*Tr.* p. 312.)

The present bill of complaint, hereinafter referred to as the "new suit," may be divided into nine broad sections:

First: Pleadings, findings of fact and conclusions of law, and decree in the "old suit." (*Tr.* pp. 2-94.)

Second. Allegations by way of inducement setting out the facts and surrounding circumstances prior to the bringing of the "old suit" and explanatory of the causes of which said "old suit" was the effect. (*Tr.* pp. 95-115.)

Third. Allegations setting out the defense which these plaintiffs, and in particular T. S. Nowell, were prevented by the conspiracy and fraud of these defendants from making in said "old suit," and setting out the acts done in pursuance of said conspiracy and fraud and the result it was intended to attain by means thereof. (*Tr.* pp. 115-163.)

Fourth. Allegations of facts showing more clearly the situation of the parties in June, 1896, and thereafter, confirming and corroborating T. S. Nowell's

defense, which the fraud and conspiracy of these defendants prevented T. S. Nowell from presenting to the trial court in the "old suit." (*Tr.* pp. 163-184.)

Fifth. Allegations of the circumstances under which this said fraud and conspiracy were discovered and why they were not earlier discovered. (*Tr.* pp. 184-202.)

Sixth. Allegations of want of jurisdiction to hear and determine the "old suit." (*Tr.* pp. 202-204.)

Seventh. A short summary of the principal facts alleged in this bill. (*Tr.* pp. 204-210.)

Eighth. Prayer for relief. (*Tr.* pp. 213, 214.)

Ninth. Exhibits attached to this bill and affidavit of counsel identifying the same. (*Tr.* pp. 215-305.)

The "old suit" was a suit for specific performance of an alleged contract by and between T. S. Nowell and the Berners Bay Company to convey to the said Company three certain mining claims in Alaska known as the "Johnson Group." The bill in the "old suit" after alleging the incorporation of the Berners Bay Company, its organization by T. S. Nowell, its recapitalization in 1896, the appointment of a receiver of the Company in 1897, and various other matters, alleged in substance as follows: That about June, 1896, T. S. Nowell, on behalf of himself and W. E. Nowell, represented to the stockholders and creditors of the Berners Bay Company the advantages that would accrue to said Company by the acquisition of certain fifteen mining claims owned by the said Nowells, and particularly of these certain claims known as the "Johnson Group," and increasing the capital stock of

NOTE.—The appellants are named as plaintiffs and the appellees as defendants in this brief.

said Company for purchasing said claims and of incurring additional indebtedness to prosecute the business; that said Nowells represented that they owned said claims and would sell them to said Company for \$1,500,000 of capital stock, and proposed that the bonded indebtedness of the Company be increased in the sum of \$300,000; that in pursuance thereof a special stockholders' meeting was to be called to acquire said property; that prior to June 24, 1896, T. S. Nowell as President of said Company caused a notice of stockholders' meeting to be issued wherein it was proposed to sell the said mining claims to said Company, naming all fifteen of the claims, and further alleging that it was proposed in said notice of stockholders' meeting to increase the capital stock of the Company from \$1,000,000 to ^{275,000} ~~\$2,500,000~~ and the bonded indebtedness from ~~\$300,000~~ to \$500,000; that the said notice was signed by T. S. Nowell as President, and that the stockholders' meeting was held on June 24, 1896, at which meeting it was voted to increase the capital stock and bonded indebtedness as above proposed, and all of the \$1,500,000 of capital was voted to be delivered to T. S. and W. E. Nowell; that thereafter the Berners Bay Company paid to said Nowells the full consideration and purchase price of \$1,500,000 of capital stock for said fifteen claims, and that the true intent and meaning of the proceedings at the stockholders' meeting was to sell to the Berners Bay Company the said fifteen claims including the said "Johnson Group." (*Tr.* pp. 2-15.)

The bill in the "old suit" then alleged, "upon information and belief," as follows:

NOTE.—The Berners Bay Mining and Milling Company is referred to in this brief as the Berners Bay Company.

“that after the date of said stockholders’ meeting, and after the said sale of said fifteen mining claims to said corporation, as aforesaid, by the insertion in an offer of sale recorded in the minutes of the said stockholders’ meeting of the words ‘last twelve,’ the true intent and meaning of said transaction was wrongfully and fraudulently changed and altered,”

and that thereafter, and pursuant to a scheme and conspiracy, the said Nowells failed, neglected and refused to convey the said three claims constituting the said “Johnson Group” to said Company. (*Tr.* p. 16.)

The bill in the “old suit” then alleges the organization of the Nowell Mining & Milling Company and of the Alaska Nowell Gold Mining Company, to take over the said “Johnson Group,” the securing of a United States patent title thereto, followed by the prayer that the defendants in the “old suit” (these plaintiffs) be decreed to hold the said “Johnson Group” in trust for the said Berners Bay Company. (*Tr.* pp. 17–23.) The bill was verified by W. B. Hoggatt, who on January 3, 1906, had been appointed co-receiver with F. D. Nowell and ordered by the court to bring the “old suit” and manage the litigation. The “old suit” was numbered 519–A on the docket of the Alaska District Court at Juneau, and the appeal No. 1436 on the docket of this Court of Appeals.

The petition of intervention of Henry Endicott in the “old suit,” one of the defendants in this present appeal, contained almost identical allegations as are contained in the bill of complaint in the “old suit.” (*Tr.* pp. 24–44.) In addition thereto the petition of

intervention of Henry Endicott alleged in substance as follows: that on June 3, 1896, T. S. Nowell made a proposition in writing to Henry Endicott, stating that the holders of 46 bonds of the Berners Bay Company desired to sell them and also 292 shares of stock of said Company, and that the whole could be purchased for the sum of \$47,948.35; that said bondholders were not willing to extend their bonds, but were insisting upon foreclosure; that if Henry Endicott could raise \$27,948.35, said T. S. Nowell could raise the remaining \$20,000; that T. S. Nowell in consideration of H. Endicott raising said \$27,948.35 to purchase said 46 bonds and 292 shares of stock, he (T. S. Nowell) would convey or cause to be conveyed to the Berners Bay Company, fifteen lode mining claims, including the three claims constituting the said "Johnson Group"; that relying upon the representations of said T. S. Nowell, said H. Endicott purchased eight of said 46 bonds for himself and induced Aaron Hobart, George Thacher, Charles H. Sawyer, and Wallace Hackett to purchase 33 of said bonds, aggregating 41 of said 46 bonds, and Guy Lamkin purchased the remaining five of said bonds, and that said H. Endicott and all of said parties purchased at said time said 292 shares of stock of the Berners Bay Company, and that H. Endicott was so induced to purchase said eight bonds by reason of the representations of said T. S. Nowell that he would convey or cause to be conveyed to the Berners Bay Company the said "Johnson Group," together with the said other twelve claims. (*Tr.* pp. 31, 32, 33, 34, 35.)

Answers were filed to the bill and petition denying the foregoing allegations and setting up the affirmative

defense, among other things, of a United States patent title acquired in 1902, acquiescence of the Berners Bay Company and its stockholders and officers in the Nowell title for more than nine years with full notice of all these facts, and praying that the pretended claim of the plaintiffs in the "old suit" be adjudged stale and without equity. (*Tr.* pp. 45-53.) The replies admitted the conveyance to the Nowell and Alaska Nowell Companies, and the patent title, and denied the remaining allegations, not having "sufficient information upon which to form a belief." (*Tr.* pp. 53-59.) The depositions of T. S. Nowell ~~and W. E. Nowell~~ ^{was} were taken by the plaintiffs in the "old suit" early in March, 1906, but none of the exhibits which they had secreted and purloined were shown ~~either of~~ ^{aid} ~~the~~ Nowells by counsel for these defendants. (*Tr.* p. 138.) The depositions of the Endicotts were taken in April, 1906. (*Tr.* p. 152.) Henry Endicott at the time he testified in the "old suit" produced a typewritten memorandum, dated June 3, 1896, which was unsigned, and testified that it constituted the terms of the contract that had been agreed upon by and between him and T. S. Nowell (*Tr.* pp. 153, 154), which said unsigned memorandum is set out in the twelfth finding of fact of the court in the original cause, and which said unsigned memorandum contained a proposal to convey said fifteen claims to the Berners Bay Company. (*Tr.* pp. 70-72.) Henry Endicott also produced a notice of call to the stockholders' meeting of June 24, 1896, signed by T. S. Nowell and four of the six remaining directors (*Tr.* pp. 75-77), which call did not enumerate all the names of the said fifteen mining claims, and being defective said notice was not

issued to the stockholders. (*Tr.* p. 121.) Henry Endicott testified that this was the true and only call, although the pleadings were based upon an offer of fifteen claims offered to the stockholders pursuant to said call. (*Tr.* pp. 156, 157, 35.) Henry Endicott also produced a rough draft of an offer which contained several interlineations, one of which was of the words "last twelve," and testified that the interlineations were made in the handwriting of W. M. Payson, when he did not know the handwriting of said Payson. (*Tr.* pp. 155, 156.)

None of these writings were shown to T. S. Nowell during his said examination, nor had he any opportunity to explain them or refresh his memory by their means. (*Tr.* pp. 138, 139.) T. S. Nowell denied that the "Johnson Group" was ever offered to the Berners Bay Company; he testified that the offer was changed so as to exclude the "Johnson Group," but could not, after ten years, remember the reason why. (*Tr.* pp. 261; 185.)

The trial court decreed that the "Johnson Group" had been sold to the Berners Bay Company at said stockholders' meeting of June 24, 1896; that the records had been fraudulently altered, and that the said Nowells held the title of the said "Johnson Group" in trust for the said Berners Bay Company. (*Tr.* pp. 88-94.) This court affirmed that decree in 162 Federal Reporter, 432.

The bill in this present appeal sets forth the facts and circumstances and fraud and conspiracy of these defendants which prevented T. S. Nowell from making "full and complete explanation" (162 Fed. 439) in the "old suit." A petition for rehearing and a petition

relating to decree and mandate were filed after affirmance of said decree (the latter petition Exhibit "F" to this bill) (*Tr.* pp. 249-282), but these petitions were denied on November 2, 1908, without any reasons being given by this court. On November 7, 1908, these plaintiffs filed a petition (Exhibit "G," *Tr.* pp. 283-300) in this court to open up decree for fraud of the parties in obtaining the same, which was denied, but this court said to counsel orally from the bench that the proper course for these plaintiffs to pursue was to bring an independent proceeding in the trial court to vacate the former decree for fraud (*Tr.* pp. 202, 302), whereupon this suit at bar was instituted on March 2, 1909, to have set aside and annulled the decree in the above-named "old suit" No. 519-A on the docket of the United States District Court, Division No. 1, at Juneau, Alaska, the appeal of which is entitled *Nowell et al. v. McBride et al.*, No. 1436, in this Court of Appeals, upon the ground of fraud and fraudulent conspiracy in the obtaining of said former decree. (*Tr.* p. 202.)

The following principal facts, among other facts, as constituting the said fraud and fraudulent conspiracy upon which these appellants base their right for relief against the decree in the "old suit," are alleged in the present bill of complaint, beginning at *Tr.* p. 95, as follows:

The Berners Bay Company was organized in 1892 and capitalized at \$1,000,000 common stock and \$200,000 bonded indebtedness; in 1896 it was recapitalized on the basis of \$2,500,000 common stock and \$500,000 bonded indebtedness. F. D. Nowell was appointed receiver of said Company on February 12,

1898, and was removed September 27, 1906, when J. C. McBride was appointed his successor. During the receivership the receiver, F. D. Nowell, incurred indebtedness, including interest, of about \$400,000, with the consent of the defendants Endicott and Hackett and other directors, stockholders and bondholders of said Company. In 1898 the Company owned about forty-five or fifty claims in Alaska, almost wholly undeveloped and of small proportionate salable value. The receiver developed the properties with the consent of defendants Hackett and Endicott and other stockholders and bondholders of the Company by driving the Kensington crosscut, thereby demonstrating a net value of \$2,700,000. The Endicotts purchased a large amount of the receiver's certificates issued by F. D. Nowell as receiver. The "Johnson Group," the property in controversy, is situated on the same mineral belt, about 2,600 feet in a direct line back of the Kensington lode, which distance it will be necessary to drive a tunnel in order to reach the ore deposits of the "Johnson Group." In January, 1906, the Berners Bay Company owed the receivership about \$400,000, its bondholders \$500,000 and accrued interest money, besides a large floating indebtedness, and was insolvent. (*Tr.* pp. 95-99, 174, 177.)

Beginning with page 99 of the Record the bill goes on to allege the facts surrounding the inception of the "old suit," and alleges the facts showing the motives of the defendants in instigating said "old suit" and the object that was to be thereby attained, as follows:

In 1905, defendants Endicott, Hackett, Corning, Gillespie and Fairchild entered into a conspiracy

whereby under an ostensible reorganization plan of said Berners Bay Company they were to acquire the properties of said Company and organize a new corporation on the basis of \$3,000,000 capital stock, \$1,000,000 preferred stock and \$250,000 first mortgage bonds to be sold for \$150,000 of cash, to the said conspirators. The creditors of the Berners Bay Company were to be induced to exchange their receiver's certificates and mortgage bonds for stock in said new corporation and cancel their liens against said Berners Bay Company, whereby said new company would acquire a legal title to the properties of said company discharged of all prior liens. A majority of the capital stock of the new company was to be retained by the reorganization committee, defendants Corning, Gillespie and Fairchild, ostensibly for services rendered, whereby they would secure for themselves the controlling interest in the new corporation. The Nowells had no confidence in this so-called reorganization plan, owing to the inadequacy of the new cash capital involved, whereby the foreclosure of the new mortgage bonds was a constant menace to the subordinate liens (*Tr.* pp. 104, 105), and, apart from that, the Nowells had been informed of the intention of Corning, Gillespie and Fairchild and their co-conspirators so to manage the business that the new company would not make a success but would become insolvent, and the mortgage be foreclosed, whereby the whole properties would fall into the hands of the conspirators without their paying a dollar for them, to the great damage of the real creditors of the Berners Bay Company. (*Tr.* pp. 99-106.)

These plaintiffs have owned the "Johnson Group"

in fee simple since 1898, and in 1902 secured a United States patent therefor. (*Tr.* p. 103.)

In 1905 defendant Corning visited Alaska and attempted to induce the Nowells to join this said plan of reorganization of the Berners Bay Company. (*Tr.* p. 104.) This the Nowells refused to do on the ground that they did not consider Corning's reorganization plan a satisfactory and safe settlement for the creditors of the Berners Bay Company. (*Tr.* p. 105.)

Owing to the great value of the "Johnson Group," Corning, Gillespie and Fairchild and their co-conspirators were very desirous that the "Johnson Group" should be included in their fraudulent reorganization plan, and for the purpose of inducing these plaintiffs to consent to join them therein the said Corning plan provided \$250,000 of common stock for the purchase of the "unencumbered title" to the "Johnson Group," to be issued to the Nowells in payment therefor, the plan of the said conspirators being to render said \$250,000 of common stock valueless by a foreclosure of the said mortgage for \$250,000, whereby these defendants and their co-conspirators would become the absolute owners of the said "Johnson Group" without paying a dollar for it to the Nowells, the true owners thereof. (*Tr.* pp. 106, 107.) Failing in their efforts to secure the coöperation of the Nowells, Corning and his associates (these defendants) then began a course of litigation against the Nowells in order to coerce them into joining the said Corning plan, and in particular brought the "old suit," No. 519-A, against them for a conveyance of the said "Johnson Group" to the Berners Bay Company. (*Tr.* p. 108.) They secured the appointment of one W. B. Hoggatt as co-receiver,

who was appointed on January 3, 1906, and ordered by the trial court to bring and manage the said "old suit." (*Tr.* pp. 112, 113.) Hoggatt knew nothing about the facts alleged in the bill of complaint, which he verified. He employed the same counsel as Corning and his co-conspirators, and the entire control was left by said Hoggatt in Corning and his co-conspirators. (*Tr.* p. 113.) Hoggatt was the mere nominal plaintiff as co-receiver, never having had the slightest interest in the Berners Bay Company. (*Tr.* p. 204.) Corning and his co-conspirators hoped, of course, to deceive the court into making a decree in their favor, but their real purpose in instituting the "old suit" was to put these plaintiffs to such trouble and expense in defending their reputations and property rights that out of sheer pecuniary inability to pay the cost they would be coerced into submitting to the demands of Corning and his co-conspirators. (*Tr.* pp. 113, 114.) J. C. McBride also had nothing to do with the management of the said original suit, No. 519-A, but simply lent his name thereto. (*Tr.* p. 114.) McBride was appointed receiver in September, 1906, five months after the trial of said cause. (*Tr.* p. 3.)

On October 30, 1905, defendant Hackett removed certain books from the Metropolitan Storage Warehouse at Cambridge, Massachusetts, belonging to the Berners Bay Company, and at the same time took away several letter-press copy books and books of account, the private property of T. S. Nowell. The taking of these books by Hackett was wholly unauthorized, without the consent or knowledge of T. S. Nowell, President of the said Berners Bay Company. (*Tr.* p. 115.) At the time Hackett took these said books

he deceived the agents of the said Storage Warehouse Company into believing that he was taking the Berners Bay Company books only (*Tr.* pp. 118, 119), and the receipts given by Hackett to the Storage Warehouse Company contain no record whatsoever of the taking of any books belonging to T. S. Nowell (*Tr.* pp. 115, 116, 118), although Hackett at the time well knew that he took several private and personal letter-books and account books of T. S. Nowell, containing his private business correspondence and records and his personal family expense accounts. (*Tr.* pp. 142, 143.) Hackett had access to these said books, both of the Berners Bay Company *and of* T. S. Nowell, owing to the fact that they were all stored together in the same room in said storage warehouse. (*Tr.* p. 115.) These books had been stored in said storage warehouse by Arthur L. Nowell, who was assistant treasurer and deputy clerk of said Berners Bay Company, and also the confidential clerk of T. S. Nowell, in the year 1900 (*Tr.* p. 141), and as he had died in 1904, there was no person living at the time the "old suit" was brought who knew anything about the details of the transaction (*Tr.* pp. 185, 186), T. S. Nowell having left all the details of his business to his said son, Arthur L. Nowell, who had acted, as above stated, as T. S. Nowell's private secretary and confidential clerk during all these times. (*Tr.* pp. 131, 132.)

Up to about April 27, 1907, these plaintiffs were entirely unaware that Hackett had taken any of the letter-books or other personal books of T. S. Nowell from said storage warehouse (*Tr.* p. 195), and they had no means, owing to the death, in 1904, of Arthur L. Nowell, of learning that fact. In April, 1907, L. P. Shack-

ford, counsel for these defendants, produced in court during the trial of the appeal of *Nowell v. International Trust Co.*, No. 1641 in this court, two of T. S. Nowell's letter-books. This was the first knowledge of the fact that any of such books had been so taken by Hackett. Subsequently thereto demand was made upon Shackelford for these books, but Shackelford filed an affidavit in court deposing that he had returned them to defendant Corning, having received the same from defendants Endicott through Corning. (*Tr.* p. 196.) These plaintiffs made repeated efforts to recover possession of these said two letter-books, but without success, when finally in pursuance of an order made in this present cause on June 20, 1910, defendants Corning and Hackett on or about September 1, 1910, deposited with the clerk of the then United States Circuit Court for the District of Massachusetts sundry books and papers belonging to the Berners Bay Company, *and six letter-books* and several private account books belonging to T. S. Nowell. (*Tr.* pp. 196, 197.) Up to this time these plaintiffs had believed and thought that the two letter-books that said Shackelford had produced in court, as above stated, were the only books that had been removed by Hackett from said storage warehouse. (*Tr.* p. 116.) But in defiance of the said order of court, these defendants still withheld and concealed and suppressed three other letter-books which contained the copies of the identical letters and other material evidence upon which the allegations of a fraudulent conspiracy in this present bill were in the first instance based. These defendants Hackett and Corning and their co-defendants did not produce these three other letter-books until after these plaintiffs

had filed a motion in court for an order for the production of the same. Therefore it was some time later than September 1, 1910, before these plaintiffs had an opportunity to inspect all the said letter-books and account books that Hackett had thus wrongfully removed from said storage warehouse and secreted and concealed from these defendants. (*Tr.* pp. 114-119.)

Three and one-half months after the taking of said books by Hackett, viz., on January 18, 1906, the "old suit," No. 519-A, was brought. (*Tr.* p. 3)

It is alleged in this present bill that at the time these defendants brought said "old suit" against the Nowells they well knew that said allegations of fraud were utterly false (*Tr.* p. 144), and that the said books and papers which Hackett had wrongfully taken from the said storage warehouse contained absolute and conclusive proof of the following facts, of which facts these defendants had absolute knowledge and notice by means of said books and papers (*Tr.* p. 119), to wit: That in the month of November, 1895, plaintiffs Nowell secured an option on the said "Johnson Group" for \$25,000, and a deed to Willis E. Nowell was, in pursuance thereof, placed in escrow; that in June, 1896, the purchase price was not paid; that in June, 1896, certain negotiations had taken place between T. S. Nowell and some of the directors of the Berners Bay Company, which negotiations contemplated the transfer to said company of the Nowell option on the said "Johnson Group," together with twelve other mining claims in pursuance of the contemplated recapitalization of the Company; that it was proposed that the purchase price of \$25,000 should be provided for

by giving to the then owners of the said "Johnson Group" the promissory note of T. S. Nowell for \$25,000, secured by the mortgage bonds of the said Company (*Tr.* p. 120); that the then owners of the "Johnson Group" refused to accept this proposition; that the Berners Bay Company was unable to provide the \$25,000 of purchase price in cash, and that for this reason it was decided by the directors of the Company not to include the "Johnson Group" in the proposed recapitalization of the Berners Bay Company, and for that prudential reason it was left out of the deal prior to the meeting of June 24, 1896. They also learned that the unrecorded call to said stockholders' meeting was prepared and was abandoned because it was defective in that it did not contain the names of all the mining lode claims that it was at the time intended should be offered to the Company, which defective call is the one set out in the thirteenth (13th) finding of fact made by the court in the "old suit" (*Tr.* p. 121, 122); that in its place another call was prepared, signed by all the directors and issued to the stockholders, which notice or call is the one recorded in the record book of the Company (*Tr.* p. 122), which said two notices or calls had been left amongst the papers and files of the Berners Bay Company and found there by Hackett and his co-conspirators; that at a stockholders' meeting held on June 24, 1896, T. S. Nowell offered the "last twelve" mining claims named in the call actually issued, which offer expressly excluded the said "Johnson Group"; and that the stockholders accepted this offer of the said twelve claims; that the said offer had originally included the "Johnson Group," but upon abandonment as aforesaid of the said plan to offer it to the

Company it had been changed before being submitted to the stockholders' meeting by the interlineation of the words "last twelve," thereby expressly excluding an offer of the "Johnson Group" to the Company. (*Tr.* p. 123.)

They further learned, or had knowledge of the facts, that at the directors' meeting held on June 30, 1896, called by T. S. Nowell for that express purpose, the directors of the said Company, including Henry Endicott, ratified the acceptance by the stockholders of the offer of the "last twelve" claims only at said meeting of June 24, 1896 (*Tr.* pp. 123, 124, 125); that prior to said directors' meeting T. S. Nowell had written a personal letter to every director of the Company asking each director to be present at said directors' meeting of June 30, 1896; that T. S. Nowell was in close touch with his directors and always consulted with them and desired that the directors should "direct" the Company (*Tr.* p. 124); that the directors, including Henry Endicott, voted on June 30, 1896, to ratify the acceptance of the "last twelve" claims only at their meeting held on June 24, 1896 (*Tr.* p. 125); that although the stockholders had accepted the offer of twelve claims only, and although the recapitalization of the Berners Bay Company had been carried out after the acceptance of the said twelve claims at said stockholders' meeting of June 24, 1896, T. S. Nowell still desired to secure a conveyance of the "Johnson Group" to the Company and continued to make efforts to that end, and although the Company was unable and his associates were unable to pay the purchase price therefor, T. S. Nowell did not cease his efforts to secure the conveyance by means of giving his personal

note with the mortgage bonds of the Company as collateral security, until it was found impossible so to do, when the Nowells, between July, 1896, and June, 1898, themselves paid the purchase price of \$25,000 and took title to the said "Johnson Group." (*Tr.* pp. 125, 126.)

These defendants further learned, or had knowledge of the facts, that the large indebtedness of the Berners Bay Company and T. S. Nowell to the Tremont National Bank of Boston and to said Nowell's associates rendered it of paramount importance that the Company and T. S. Nowell should not become insolvent and fail in 1896; that the recapitalization of the Company should be carried out and consummated regardless of any proposed ownership of the Johnson properties or the acquisition by the said Company of the title thereto, and that the said recapitalization was not even induced by the promise of T. S. Nowell to convey it (*Tr.* pp. 126, 169), but in order that the Company might have further time in which to develop its properties (*Tr.* p. 171), secure fresh capital by the sale of its new bonds, put itself on a paying basis, and pay its debts to its creditors, and thereby also enable T. S. Nowell to pay his debts to these said defendants and his other creditors. (*Tr.* pp. 126, 127.)

In connection with this large indebtedness of the Berners Bay Company and T. S. Nowell to said Tremont Bank it is to be noticed that Aaron Hobart, President of said bank, defendants Endicott and George Thacher, three of its directors, and D. E. Snow, its cashier, were, in June, 1896, all interested in the Berners Bay Company either as stockholders or bondholders or both (*Tr.* pp. 165, 166); that at the

time, June, 1896, the owners of 46 bonds of the Berners Bay Company were refusing to extend their said bonds and were threatening to bring about a foreclosure of the mortgage of the Company; that the only way in which to prevent a foreclosure of said mortgage and carry through the proposed recapitalization was to purchase the bonds of these recalcitrant bondholders (*Tr.* p. 169, 170); and while buying the said 46 bonds in order to get rid of these dissatisfied bondholders, the Endicotts not only believed the said bonds to be a good purchase but also believed that they would ultimately be paid (*Tr.* p. 167); and these defendants had knowledge of the fact that the purchase of said 46 bonds was not made by the said Endicotts, Hackett, Hobart, Thacher, Sawyer and Lamkin as a permanent investment in said bonds, but that said purchase of said 46 bonds was made as a temporary expedient to avoid the foreclosure of the mortgage of the Berners Bay Company, and that after the recapitalization of the Company had been accomplished it was the intention and purpose of said Endicotts and their above-named associates to sell said 46 bonds to outside parties and to retain the 292 shares of stock of the Berners Bay Company which were included in the purchase of said 46 bonds as their profit on the transaction. (*Tr.* p. 171.)

These defendants further learned or knew that the promise to convey the "Johnson Group" to the Berners Bay Company did not induce the Endicotts to purchase the said bonds in June, 1896, but that they did so to protect their stockholders' interest in said Berners Bay Company and the \$134,000 of indebtedness at that time owed them by T. S. Nowell (*Tr.* pp. 172, 173),

and that the proposed recapitalization of said Company was the means by which it was intended and proposed to prevent the failure of said Company and of T. S. Nowell, and to enable the Company to raise fresh capital and thereby avoid its failure and that of T. S. Nowell, which otherwise would have resulted in compelling the associates of T. S. Nowell to pay the debts of said Company and said Nowell (*Tr.* p. 127), in that at the time, in June, 1896, the combined indebtedness of the Berners Bay Company and of T. S. Nowell to the Tremont National Bank of Boston, Massachusetts, to these defendants and to the other purchasers of the said 46 bonds of the Company was upwards of seven hundred thousand (700,000) dollars (*Tr.* p. 166), which indebtedness these defendants and the other purchasers of said bonds would either have been obliged to lose or pay unless the Berners Bay Company and T. S. Nowell were kept from failing in 1896; that the recapitalization of the Berners Bay Company was imperative to prevent the failure of the Company and of T. S. Nowell for the protection of the Tremont National Bank and of these defendants and other creditors (*Tr.* p. 167); that it was imperative that the failure of the Berners Bay Company and of T. S. Nowell be averted in 1896 for the personal protection of said Aaron Hobart, president, and Endicotts, directors of said bank, who did not wish it to become a matter of public knowledge that they had been using the funds of said bank to the extent of upwards of \$175,000 for promoting speculative gold mining enterprises (*Tr.* p. 168), and for which large sum they would have been obliged to reimburse the bank had the Berners Bay Company and T. S. Nowell failed in

1896 (*Tr.* p. 167); that it was imperative to avert the failure of the Berners Bay Company and of T. S. Nowell as a matter of protection to defendants Hackett and Fairchild, debtors of the said bank for large amounts of cash advanced by said bank to the Berners Bay Company on the names of said Hackett and Fairchild as individuals (*Tr.* p. 169), and as directors (*Tr.* p. 124), of said Company (*Tr.* p. 175); that in addition to all the above-named indebtedness there was also a large indebtedness of upwards of \$150,000 owed by the Company and T. S. Nowell to other financial backers and associates, whose negotiable paper and endorsements had been discounted in and were held by the said Tremont National Bank, constituting an indebtedness, direct and indirect, of upwards of \$300,000 owed to said bank by reason of the promotion of Nowell mining interests. (*Tr.* pp. 167, 174.)

The foregoing is a brief statement of some of the facts and circumstances surrounding the transactions of June, 1896, alleged in the present bill of complaint.

It is also further alleged in this bill that these defendants learned by means of these said books, and had absolute knowledge of the facts, that the "Johnson Group" was never offered to or accepted by the Company; that the records of the stockholders' meeting of June 24, 1896, were true; that the records had never been changed for any purpose whatsoever, fraudulently or otherwise, and that the contract to sell the "Johnson Group" to the Berners Bay Company had never been made (*Tr.* pp. 143, 144); further, that Wallace Hackett and the Endicotts in 1897 had voted as stockholders to divide the properties of the Berners Bay Company into three parts, which was done and which division ex-

pressly excluded the "Johnson Group" (*Tr.* pp. 127, 128); that in 1899 Wallace Hackett and the Endicotts voted as stockholders to grant a right of way through the tunnel of the Berners Bay Company to these plaintiffs as the owners of the said "Johnson Group" (*Tr.* p. 128); that in the years 1900-1904 Hackett and the Endicotts repeatedly recognized the rightfulness of the title of these plaintiffs to the "Johnson Group" (*Tr.* pp. 128, 129), (see Exhibit "A" attached to the Bill of Complaint in which, under date of September 13, 1900, William Endicott writes to T. S. Nowell that if he [Endicott] hears that T. S. Nowell "will put in the Johnson" in the then proposed reorganization of the Berners Bay Company, "we [Endicott and associates] will not hesitate to trade" [*Tr.* p. 219]); that during the years 1896-1900 Wallace Hackett and the Endicotts did many other acts showing their absolute recognition of the rightfulness of the Nowell title to the "Johnson Group" (*Tr.* pp. 130, 180); that in 1905 Hackett and the Endicotts deposited their securities under the said Corning reorganization plan and the Endicotts offered T. S. Nowell substantial pecuniary inducements to accept the \$250,000 of stock under that plan for the "Johnson Group" (*Tr.* p. 129); and William Endicott under date of July 18, 1905, wrote to T. S. Nowell saying that what T. S. Nowell "can receive for the Johnson will be quite a fortune in itself" (see Plaintiffs' Exhibit "D," *Tr.* p. 242); that subsequently to June, 1896, defendants Hackett and Endicott purchased a large majority of the bonds of the Berners Bay Company, well knowing that the "Johnson Group" was claimed by the Nowells as their absolute property (*Tr.* pp. 129, 130), and well knowing that the mortgage

of the Berners Bay Company did not include the "Johnson Group" (*Tr.* p. 179), and that the Endicotts between 1898 and 1902 purchased upwards of \$60,000 of receiver's certificates, well knowing that the "Johnson Group" had not been taken into possession by the said receiver. (*Tr.* p. 130.)

Between the years 1897 and 1900 the Endicotts advanced more than \$400,000 to T. S. Nowell for the benefit of the Berners Bay Company, without demanding or in any way stipulating that he should convey the "Johnson Group" to the Berners Bay Company. (*Tr.* p. 130.) Between the years 1896 and 1906 Hackett and the Endicotts many times coöperated with T. S. Nowell in negotiating several contracts to sell the Berners Bay Company properties, in all of which proposed contracts the Nowell title to the "Johnson Group" was conceded as an undisputed fact. (*Tr.* pp. 130, 131) (see Plaintiffs' Exhibits "B" and "C," *Tr.* pp. 220 *et seq.* and *Tr.* pp. 234 *et seq.* respectively.) They also knew that T. S. Nowell was the unsecured creditor of the Berners Bay Company for about \$300,000 or \$400,000 (*Tr.* p. 131), and at the time, in 1905, defendants Hackett and Endicott became associated with Corning *et al.* in his said reorganization plan, they believed that T. S. Nowell could be of no further use to them in negotiating a sale or reorganization of said Berners Bay Company (*Tr.* p. 131); they further learned that the only persons who had ever had a personal knowledge of the transactions of June, 1896, were T. S. Nowell and A. L. Nowell, and that the latter had died in January, 1904, two years before the "old suit" was brought. (*Tr.* pp. 131, 132.)

At the time they alleged fraud in the "old suit" against Willis E. Nowell these defendants well knew that

he was not in Boston in June, 1896, but that he was in ~~Alaska~~ and that he had not taken any part in the transactions of June, 1896, had no knowledge of the negotiations, was not present at the said stockholders' meeting, had taken no part in the vote at said meeting; that he had nothing to do with the records of the Company, and that he was absolutely innocent of any and all intent to defraud the Berners Bay Company out of a farthing (*Tr.* p. 132); they also knew that all of the writings of the Company and of T. S. Nowell pertaining to the said transactions of June, 1896, were in the absolute possession of these defendants and under their absolute control; that owing to the extreme age of T. S. Nowell and to the lapse of ten years, his memory was almost a blank concerning said transactions, and that having taken and carried away and concealed all of the evidence that had been in the possession of T. S. Nowell, these defendants knew that by the purloining and secreting of the same they would be able to perpetrate the contemplated fraud and prevent said T. S. Nowell from refreshing his memory and thereby prevent him from making a meritorious defense against the said false allegations of fraud. (*Tr.* pp. 132, 133.) Hackett, the Endicotts and their co-conspirators, after all these years of acquiescence, well knowing that the Nowells were innocent, and knowing that their suit was fraudulent and fictitious, determined by the commission of perjury and by the purloining and concealment of the said books and papers to prevent T. S. Nowell from presenting his meritorious defense, and by the production of false evidence to deceive the court into making a decree to the effect that the Nowells had actually offered

the "Johnson Group" to the Berners Bay Company, that the Company had accepted that offer, and that the Nowells had fraudulently altered the records of the Company with the intention of defrauding the said Company of its title to the said "Johnson Group." (*Tr.* p. 134.)

It is further alleged that these defendants by the purloining and secreting of these said books and papers *did* prevent T. S. Nowell from making the adequate and meritorious defense in the "old suit" that he would have been able to make had the said books and papers not been so purloined and secreted by these defendants (*Tr.* pp. 138, 139), and by means of which purloining and secreting the trial court was kept in complete ignorance of the real merits of the case, with the result that there was never any real or adversary contest in the cause or any adjudication on the merits as they in truth and fact exist (*Tr.* p. 211), for the reason that a production in court of said purloined and concealed books would have disclosed the truth (*Tr.* p. 151), and the fraudulent character of the original suit, and but for which fraud and purloining and concealment and perjury the said unjust and untrue decree would not have been made (*Tr.* pp. 210, 211); which said decree has resulted in great damage to the property rights and reputations of these plaintiffs and to the reputations of other innocent parties. (*Tr.* pp. 151, 152.)

These defendants Hackett and H. Endicott and Fairchild were directors of the Berners Bay Company during all these times (*Tr.* p. 95), and these defendants are claiming that all said books, letter-books and papers are the property of said Company

(*Tr.* p. 148), and during all these times they purloined and secreted said books and papers from the plaintiffs Nowell, stockholders of said Company, contrary to their duty as such directors (*Tr.* pp. 118, 124), and thereby deprived these plaintiffs as such stockholders of all opportunity to inspect the said books and papers. (*Tr.* p. 149.)

It is further alleged that the allegations of fraud contained in the said bill of complaint and petition of intervention were so vague and misleading as to give these plaintiffs no notice of the actual facts they would be obliged to meet, and did actually mislead them (*Tr.* p. 135); and these defendants knew that by withholding the interlined offer and concealing the same from T. S. Nowell, owing to old age and the lapse of ten years, he could have no recollection of the same, and that the allegation of the insertion in an offer of sale recorded in the minutes of said stockholders' meeting of the words "last twelve" could give no notice to T. S. Nowell concerning the same or concerning the state of facts that these defendants were about to deceive the court into believing to be true. This veiled allegation made it appear on its face as if these defendants would have to defend against an allegation that the *records themselves* had been fraudulently changed and altered instead of the offer itself. (*Tr.* p. 136.)

These plaintiffs were in utter ignorance and darkness as to the fraudulent devices and deceptive concealments and misleading pleadings resorted to by these defendants in the "old suit" for the purpose of keeping these plaintiffs uninformed as to what they should do to defend themselves. In consequence of these fraud-

ulent devices and deceptive concealments and misleading pleadings made and done with the intention so to mislead these plaintiffs and keep them in ignorance of the state of facts they would have to defend against, and in pursuance of said conspiracy to cheat and defraud these plaintiffs out of their title to the said "Johnson Group," these plaintiffs were actually deceived and misled as to the state of facts they would have to meet. Only since about October 1, 1910, has a full conception and knowledge of this conspiracy been made known to these plaintiffs by means of the inspection of said books and papers which Hackett and his co-conspirators had so wrongfully and fraudulently purloined and secreted. (*Tr.* pp. 137, 138.)

In pursuance of said scheme to defraud these plaintiffs, these defendants took the deposition in the "old suit" of T. S. Nowell as their own witness, to wit, on March 5, 6 and 7, 1906, and subjected him to a long direct examination. (*Tr.* p. 138.) They conducted this examination in the way best suited to their purpose of discovering not how much but how little T. S. Nowell was able to remember of said transactions of June, 1896. During this said examination of T. S. Nowell no writing or paper relating to the subject-matter in hand then in the possession of these defendants was shown or exhibited to the said witness, and with premeditated intent so to do they thereby prevented T. S. Nowell from refreshing his memory and from giving complete and adequate answers to the very questions to which they subjected him, or from making any explanations concerning the matter in issue, and thereby intentionally and absolutely prevented and precluded T. S. Nowell from making the

meritorious and adequate defense which an examination of said books and papers would have enabled him to make, and these defendants did everything in their power during said examination to prevent a disclosure of the truth and of the said meritorious defense. (*Tr.* pp. 138, 139.) They learned in said examination that owing to the infirmities of old age and lapse of ten years T. S. Nowell could remember no more than that the "Johnson Group" had never been offered to the Berners Bay Company and could not remember the reason why (*Tr.* p. 145); that he could remember no more than that the corporate records of the Berners Bay Company contained evidence of the said transactions of June, 1896; that he had absolutely no recollection of any other evidence; that he had no recollection of the evidence these defendants had wrongfully purloined and secreted and that he would not be able to furnish counsel with information concerning evidence or concerning the sources from which other evidence could be derived. (*Tr.* pp. 139, 140.)

T. S. Nowell's memory concerning the said transactions of June, 1896, has at all times since the trial of the "old suit" been so defective that he has entirely forgotten the existence of any and all evidence concerning said transactions, and therefore he has been totally unable to be of assistance to counsel in discovering any evidence pertinent to the issues of the "old suit," with the result that for a long time after the trial and appeal of said original suit counsel for these plaintiffs had no knowledge of the existence of any such pertinent evidence, other than that contained in the record of the "old suit." (*Tr.* pp. 145, 146.)

It is further alleged that had T. S. Nowell been permitted to examine said letter-books it would have

enabled him to recall the reason why the "Johnson Group" was not offered to the Company and why it was finally decided by the directors not to include it in the said offer to the stockholders at their meeting of June 24, 1896; that an examination of the original letters *has* enabled T. S. Nowell to recall the reason, and also to explain why the interlineations were made in the said interlined offer (Exhibit "D" in No. 519-A), and that had T. S. Nowell been permitted in 1906 to examine these letter-books he would have been able to recollect these reasons and make a meritorious defense against the wicked and iniquitous conspiracy of these defendants and the false allegations of fraud in the "old suit" (*Tr.* pp. 146, 147); that counsel for these plaintiffs at the time of the trial had no knowledge that the said letter-books had been taken and carried away by these defendants, neither did they have any knowledge of the contents of any of said books; that during the trial counsel gave notice to these defendants to produce the books of the Berners Bay Company; that these defendants are claiming that *all* said books and papers Hackett had taken from the said storage warehouse are the property of the Berners Bay Company; that in the absence of all knowledge of the contents of the books such notice could be no more than a general notice; that these defendants utterly failed to produce the books as required, but did everything in their power to conceal and suppress these said books and papers (*Tr.* pp. 147, 148); that these defendants Hackett, H. Endicott and Fairchild were directors of the Berners Bay Company (*Tr.* p. 95) and they did everything in their power to conceal and suppress said books and papers and deprive these plaintiffs Nowell

as controlling stockholders of said Company of their right to inspect said books and papers (*Tr.* pp. 148, 149); that in consequence of the possession of said books and papers these defendants had full and actual notice of the fact that the alleged contract of sale of the said "Johnson Group" to the Berners Bay Company that they were setting up in the "old suit" was utterly false and fictitious; that the allegation of fraud in the "old suit" was absolutely false and untrue, and that a decree in their favor would be contrary to truth and justice. (*Tr.* pp. 149, 150.) It is further alleged that in consequence of the purloining and secreting of said books and papers the true facts in the "old suit" were not elicited but were fraudulently kept from all knowledge of the court and these plaintiffs; that in consequence thereof these plaintiffs were prevented from making their meritorious and adequate defense; that the real and true merits of the "old suit" were never presented to the trial court for an adjudication; that the decree in the "old suit" is contrary to the truth and unjust, and was the direct result of the fraud of these defendants, of the perjury of the Endicotts and the wrongful concealment of evidence and production of fraudulent evidence by these defendants (*Tr.* pp. 150, 151); that these defendants intended to deceive and did deceive the court into making said false findings; that in consequence of this conspiracy and fraudulent purloining of evidence and perjury the truth was concealed from the court, with the result that *there was no adversary trial on the merits* in the "old suit," and that these plaintiffs were thereby defrauded of their title to the said "Johnson Group." (*Tr.* pp. 210, 211.)

Beginning with paragraph XXIV (*Tr.* p. 152) are allegations concerning the perjured testimony of Henry Endicott, and showing that in face of knowledge of all the foregoing state of facts he testified under oath in substance that the unsigned memorandum of June 3, 1896, embodied the terms of a completed and final contract to sell and convey the "Johnson Group" to the Berners Bay Company, which the directors never consented to modify, when he well knew that this unsigned memorandum was not intended to and did not embody the final terms of a contract but was tentative only and was not accepted by the directors of the Berners Bay Company but had been declined by them (*Tr.* pp. 153, 154); he testified that the interlineation of the words "last twelve" was false, and was made in the handwriting of W. M. Payson, when he did not know when it was made and did not know the handwriting of said Payson (*Tr.* pp. 155, 156); he testified that the unrecorded call to the stockholders' meeting of June 24, 1896, was the true call when he knew that it had never been issued as an original call but that the recorded call signed by *all* the directors showing a different arrangement of the names of the mining claims to be offered to the stockholders had been issued to the stockholders of said Berners Bay Company, but which recorded call these defendants concealed and suppressed after having found the same amongst the files of said Company. (*Tr.* pp. 155, 156, 157.) Said unrecorded call was not used because of the fact that it was defective, as it did not contain the names of all the mining claims that should be offered to and accepted by the stockholders at their meeting to be held on June 24, 1896. (*Tr.* p. 121.) The alleged

contract of sale of the "Johnson Group" in the "old suit" was based upon an offer and acceptance of 15 claims. (*Tr.* p. 15.)

When H. Endicott so testified, he and his co-conspirators had in their possession an original of the recorded call signed by two directors, which original they suppressed and concealed. He testified that he gave to T. S. Nowell his proxy to said meeting with the understanding that the "Johnson Group" should be offered to the Company at said stockholders' meeting, when he knew that the plan to offer to the Company and accept the offer of the same at said stockholders' meeting had been abandoned for prudential reasons by the directors of the Company and by T. S. Nowell's creditors and associates prior to said stockholders' meeting. (*Tr.* pp. 157, 158, 159, 160.) He testified upon written interrogatories concerning matters of merest hearsay as if they were within his personal knowledge, carelessly and recklessly and without taking the slightest care to ascertain the truth of his testimony. He testified that the mines were too remote for others than the Nowells to know about, when he as director in 1895 voted to send Hobart, Hackett and Plummer, his co-directors, to Alaska to examine the Berners Bay Company properties and books, which they did, and reported to Endicott in 1895 concerning their examination. (*Tr.* pp. 160, 161.) William Endicott testified substantially the same as Henry Endicott, well knowing such testimony to be false. (*Tr.* p. 162.) They both testified that they purchased the said bonds in June, 1896, relying on T. S. Nowell's promise to convey the "Johnson Group" to the Berners Bay Company (*Tr.* p. 163), when they knew that

such was not the case but that they did so to prevent the financial disaster that would result to them, the Tremont National Bank, Hackett, Hobart and their associates, should the said Company and T. S. Nowell fail in 1896, well knowing that unless the foreclosure of the mortgage of the Berners Bay Company was averted the said bank, the Endicotts and their associates would be obliged to pay or lose this enormous indebtedness of several hundred thousand dollars to the Tremont National Bank and to themselves incurred in the exploitation of the Nowell gold mining enterprises (*Tr.* pp. 167, 168), and if they thereby averted said foreclosure they believed that the intrinsic merit of the properties would enable the Berners Bay Company and T. S. Nowell to pay out (*Tr.* p. 167), and well knowing that the ownership of the "Johnson Group" by the Company was a matter of no importance to the said creditors of T. S. Nowell as compared with the imperative necessity of averting the threatened financial disaster, which could be averted solely by the purchase of the said 46 defaulted bonds owned by certain recalcitrant bondholders who were threatening to take foreclosure proceedings. (*Tr.* pp. 169, 170.) The averting of this threatened disaster was imperative as a matter of protection not only to the Tremont National Bank but also to the associates of T. S. Nowell, including defendants Endicott, Hackett, Fairchild, Aaron Hobart, George Thacher, Charles H. Sawyer and Guy Lamkin, and who, except Fairchild, were the seven purchasers of the 46 Berners Bay Company bonds in June, 1896 (*Tr.* p. 171), and whose purchase of said bonds was alleged to have been made in consideration of T. S. Nowell's agreement to con-

vey the "Johnson Group" to the Berners Bay Company (*Tr.* p. 34), when in fact the averting of the failure of said Company and of T. S. Nowell and the saving of loss to themselves was the express purpose for which the bonds were so purchased by them. (*Tr.* pp. 170, 171.)

In June, 1896, defendants Endicott were interested in the Berners Bay Company as stockholders solely, and the recapitalization of said Company involved upwards of \$134,000 of their money loaned to T. S. Nowell, and the Endicotts participated in and approved of said recapitalization to prevent the failure of T. S. Nowell, believing in the merit of his gold mining enterprises and his ability ultimately to pay his indebtedness to them should he be given further time. (*Tr.* p. 172.)

Defendants Endicott regarded the ownership of the "Johnson Group" by the Nowells for nearly ten years with complete acquiescence (*Tr.* pp. 172, 173), but when in 1905 they believed T. S. Nowell could be of no further service to them in making a success of the Berners Bay Company they entered into this conspiracy to attack him in the courts and sought to avoid the legal effect of their ten years of acquiescence and delay in pursuing their pretended rights by falsely alleging fraud in pursuance of their fraudulent conspiracy to deceive the court into making an unjust and untrue decree against these plaintiffs. (*Tr.* p. 173.) Subsequent to the transaction of June 24, 1896, the Endicotts induced the said Tremont National Bank to loan the Berners Bay Company upon its bonds upwards of \$49,000, so that the total amount advanced by the bank to the Berners Bay Company upon its

bonds was about \$138,000 upon \$72,000 bonds. (*Tr.* p. 174.) In addition to this indebtedness of the said Company to the Tremont National Bank upon the Company's bonds as collateral security, the bank loaned the Company about \$83,000 upon its promissory notes endorsed by the directors of the Company (*Tr.* p. 175), three of whom were defendants H. Endicott, Hackett and Fairchild. (*Tr.* p. 95.) Besides this, there was a direct indebtedness of T. S. Nowell to said bank of about \$87,000 (*Tr.* p. 165), and there was an indirect indebtedness to the bank of over \$150,000 by T. S. Nowell as endorser of the negotiable paper of his associates (*Tr.* p. 174) which was incurred at said bank with the knowledge and consent of the defendants Endicott as directors of said bank, and was made to promote the gold mining enterprises of T. S. Nowell (*Tr.* p. 175), in which enterprises defendants Endicott were large stockholders and bondholders. (*Tr.* pp. 129, 130.) The large sums the said bank was induced by said Endicotts to advance to the Company subsequent to June, 1896, were advanced with full knowledge of the Endicotts of the facts that all idea of purchasing the "Johnson Group" had been abandoned by the directors of the Company; that the Company had purchased twelve claims only; that the "Johnson Group" had not been conveyed to the Company; that the Nowells were claiming it as their absolute property; that the mortgage of the Company did not include the "Johnson Group," and that the bonds of said Company were in default at the times they so induced the said bank to loan its funds upon the bonds of the Company, except at such times when said Endicotts, Hobart and Thacher, as its directors,

had induced said bank to loan its funds to said Berners Bay Company to enable it to pay the accrued interest money on its bonds. (*Tr.* pp. 175, 176, 177.) Subsequent to June, 1896, and with knowledge of all these facts, the Endicotts exchanged their bonds of the first issue for a like amount of the new issue of Berners Bay Company bonds and purchased upwards of \$180,000 of the new bonds of the Company, and between June, 1896, and June, 1899, the Endicotts advanced to T. S. Nowell for the use of the Berners Bay Company upwards of \$480,000. (*Tr.* pp. 177, 178, 179.)

During all these years the Endicotts coöperated with T. S. Nowell in his efforts to sell the properties of the Company, and entered into or acquiesced in various contracts with various intending purchasers, in which contracts it was provided that the Nowells were to receive outright a large compensation for the "Johnson Group" and which expressly recognized the absolute title of these plaintiffs to the said "Johnson Group." (*Tr.* pp. 179, 180.) (See Exhibits "B" and "C," *Tr.* pp. 220-240.) They also coöperated with T. S. Nowell in selling a large number of bonds to outside parties, well knowing that the said "Johnson Group" was not in any way subject to the lien of the mortgage of the Berners Bay Company and that the mortgage bonds were in default. (*Tr.* p. 179.) The said Endicotts have freely participated with the other stockholders of said company in its various corporate transactions wherein the absolute ownership of these plaintiffs of the "Johnson Group" was conceded, ratified and confirmed. (*Tr.* p. 181.)

During all these times H. Endicott had a general power of attorney for William Endicott. Henry

Endicott is a small stockholder to the extent of but 300 out of 25,000 shares, and is the only stockholder or bondholder who has ever come into court to complain of the transactions as actually carried out. The Endicotts acquiesced therein for nearly ten years before making any complaint (*Tr.* p. 181), and during all these ten years all the parties to the purchase of the 46 bonds in June, 1896, have assented to every transaction of said Company and have ratified and confirmed all the acts of T. S. Nowell performed on behalf of said Company and have encouraged the Nowells in their belief, contention and claim of absolute and exclusive ownership of the "Johnson Group," and after all these years of acquiescence, mutual trust and confidence T. S. Nowell could not well foresee that any of his associates would commit perjury and falsely charge him with a gross fraud in the management of the Berners Bay Company. (*Tr.* pp. 181, 182.)

The perjured testimony of the Endicotts was the only testimony that was given in support of said fraudulent conspiracy to prevent the Nowells from defending said original suit, No. 519-A, which conspiracy was carried out by means of the wrongful purloining and secreting of material evidence and the suppression of the truth with the specific object and intent of deceiving the court into making a false and untrue and unjust decree against these plaintiffs whereby their property was decreed away and their reputations were blasted. These defendants are seeking to retain the "Johnson Group" as the profit of their own wrong. (*Tr.* p. 183.)

Pages 184 to 202 of the Record contain a statement of the way in which the said conspiracy and fraud were

discovered by these plaintiffs, a great number of the facts therein contained having already been stated; the salient points being that after ten years of delay by these defendants in pursuing their pretended rights, and on account of the infirmities of memory caused by old age, T. S. Nowell had no recollection of the evidence in question. Willis E. Nowell never had any knowledge of it, and Arthur L. Nowell, who was the only person in the world besides T. S. Nowell who had had any knowledge of the matter, had died in 1904. Therefore at the time of the "old suit" there was no person living who had any knowledge of the existence of any evidence that would throw light upon the transactions of June, 1896. It is elsewhere shown in the bill that Arthur L. Nowell, who was dead at the time the "old suit" was brought, had had full charge of all the details of T. S. Nowell's business and was the person who had put the said books and papers on storage in 1900, and so was the only person who ever had personal knowledge of what had actually been put on storage. When Hackett took the books and papers in question he deceived the agents of the storage warehouse company and made no record of the fact that he had abstracted any of the personal books and papers of T. S. Nowell. (*Tr.* p. 115, 116, 118, 119.) T. S. Nowell had no means of knowing that any of his books and papers had been thus wrongfully removed, and could give no assistance to counsel in the discovery of evidence. W. M. Payson was not called as a witness in the original suit, for the reason that he had told plaintiffs that he knew nothing about the transactions of June, 1896, misunderstanding that he was to be asked to testify concerning transactions between T. S. Nowell

and his associates in June, 1896. The first knowledge these plaintiffs had of the said wrongful taking of said books and papers was when L. P. Shackelford in April, 1907, produced two letter-books in court in the trial of another case (No. 1641 in this court). After repeated efforts these plaintiffs first succeeded in having access to these said books and papers in September or October, 1910. The original letters were accidentally found amongst the papers of F. D. Nowell in the spring of 1908. F. D. Nowell was one of the parties plaintiff in the original suit, an adversary party to these plaintiffs, and as he had been falsely charged by counsel for these defendants with fraud and collusion in not suing for a conveyance of the "Johnson Group" to the Berners Bay Company, he maintained a neutral and passive position and did nothing for either side in that suit, feeling that he should remain passive and neutral and let Hoggatt manage the suit as ordered by the court. Furthermore, his recollection of the transactions of June, 1896, was in April, 1906, a "blank," he having never owned a share of stock of the Berners Bay Company, and the transaction had made no impression on his mind, it being merely an incident in the financial policy of the Company over which he had no control and in which he had no interest.

That after the trial and appeal of the "old suit" the trial was had in April, 1907, of the Berners Bay Company receivership case in Juneau, Alaska, in which trial certain evidence was adduced by the receiver, McBride, which showed that defendants Endicott and the other stockholders of the said company had acquiesced for many years in the Nowell title to the "Johnson Group."

The evidence adduced in the case entitled *Nowell v. International Trust Company*, No. 1641 in this court, taken with the original letters, disclosed this conspiracy to defraud these plaintiffs, and these two lines of evidence were not seen by or known to counsel until about October 31, 1908, and not discovered until November 6, 1908. On November 7, 1908, plaintiffs filed a petition in this court to open up the decree in the original suit for fraud, which petition was denied, but this court from the bench stated orally that the proper course for these plaintiffs to pursue was to bring a suit in the trial court to have the fraud tried out on the merits and the decree vacated if the fraud should be proved. (*Tr.* p. 195.)

During all these times when plaintiffs were seeking to recover possession of said two books they had no idea that Hackett had taken away more than two books marked "R" and "S," but it later transpired that he took nine letter-books, and during these times these plaintiffs up to April, 1907, had no knowledge of the fact that Hackett had wrongfully removed any letter-books of T. S. Nowell, and not until the spring of 1908 did they know that said letter-books contained any evidence at all that was explanatory of the transactions of June, 1896, or that would enable T. S. Nowell to refresh his memory concerning the same. That up to September, 1910, these plaintiffs had all along believed that Hackett had wrongfully removed but two letter-books of T. S. Nowell from the said storage warehouse; that these defendants in pursuance of an order of court made on June 20, 1910, deposited with the Clerk of the then United States Circuit Court at Boston, Massachusetts, *six* letter-books, but in defiance

of said order of court they continued to withhold and secrete three other letter-books, which they finally were compelled to produce. The discovery of this conspiracy and fraud was rendered well-nigh impossible by the entire ignorance of Willis E. Nowell of the facts, by the entire ignorance of T. S. Nowell of the facts owing to old age and the lapse of time, by the death of a material witness who was the only person in the world besides T. S. Nowell who did have actual knowledge of the facts, by the wrongful and fraudulent purloining and secreting of evidence of the innocence of these plaintiffs and by the unanticipated perjury of old and trusted friends and associates. This present suit was brought less than four months after the discovery of the fraud and conspiracy herein complained of.

This is a short synopsis of a few of the reasons why this conspiracy and fraud were not before discovered by these plaintiffs. A perusal of paragraph XXV of this bill (*Tr.* pp. 184-202) can alone give an adequate idea of the same, the difficulty of which discovery was rendered all the more difficult by the close relations subsisting between defendants Endicott and Hackett and T. S. Nowell during the ten years next preceding the bringing of the "old suit," and owing to the high esteem in which the Endicotts had been held by T. S. Nowell he could not anticipate or provide against their perjured testimony.

It is further alleged that the trial court in the original suit was without jurisdiction to hear and determine the original cause for want of indispensable parties, the receivership having been a void one, and the receivers who brought the suit being thereby without any remedial right to bring said suit. (*Tr.* pp. 202-204.)

Paragraph XXVII of this present Bill of Complaint contains a summary of the main allegations of the bill. (*Tr.* pp. 204–210.) Then follow allegations as to the means by which this fraud and conspiracy were carried out and the false and untrue decree obtained and these plaintiffs cheated out of their title to the “Johnson Group.” That long after the abandonment of any intention of the directors of the Berners Bay Company to purchase the “Johnson Group,” to wit, in 1898, these plaintiffs completed the purchase price payments of \$25,000, and obtained a deed thereto and thereafter obtained a United States patent thereto, with the full knowledge and consent of defendants Hackett, the Endicotts and Fairchild. (*Tr.* pp. 210–212.)

Then follows a description of the affidavit of George M. Nowell and the exhibits thereto attached (*Tr.* pp. 212, 213), after which comes the prayer for specific and general relief. (*Tr.* pp. 213, 214.)

The bill is verified by Willis E. Nowell, one of the plaintiffs. (*Tr.* pp. 214, 215.)

There are eight exhibits attached to the bill, which are made a part of the bill, together with the affidavit of G. M. Nowell, attorney for plaintiffs, identifying said exhibits. (*Tr.* pp. 215–305.)

ASSIGNMENT OF ERRORS.

Plaintiffs assign as errors, upon which they will rely in the United States Circuit Court of Appeals for reversal of the decree and judgment of the trial court, the following.

I.

The trial court erred in holding that the third amended complaint herein does not state facts sufficient to constitute a cause of action, nor facts sufficient to entitle plaintiffs to the relief sought, and in sustaining the demurrer to said amended complaint.

II.

The trial court erred in rendering and entering its decree dismissing this action and giving judgment against the plaintiffs for costs. (*Tr.* p. 318.)

ARGUMENT.

I.

THE COURT ERRED IN RENDERING JUDGMENT FOR DEFENDANTS AND AGAINST PLAINTIFFS, BY DISMISSAL OF THE ACTION AND FOR COSTS.

A demurrer is a denial in form and substance of plaintiff's right to have his case considered in a court of equity, and also an admission that all the allegations of it which are properly pleaded are true.

Griffing v. Gribb, 67 U.S. 519.

Mosher v. St. Louis, etc., R. Co., 127 U.S. 390,
395.

Pullman Palace Car Co. v. Missouri Pac. R. Co., 115 U.S. 587, 596.

6 Encyc. Pl. & Prac. 396.

Where the demurrer is to the whole bill, if any part of the bill is good the demurrer must be overruled.

Pac. R.R. of Mo. v. Missouri Pac. Ry., 111 U. S. 520.

Savannah, etc., Ry. v. Jacksonville, etc., Ry., 79 Fed. 38.

A demurrer to a bill for want of equity cannot be allowed unless the court is satisfied that no discovery or proof called for by the bill or founded upon its allegations can make the cause set forth in it a proper subject of equitable cognizance.

Sprague v. Rhodes, 4 R.I. 301, 303, citing cases.

Bleeker v. Bingham, 3 Paige (N.Y.), 246, 251.

Bresler v. Bloom, 41 South. 1011.

A demurrer for want of equity will not be sustained where the facts alleged entitle complainant to some ground of equitable relief.

Buerk v. Imhaeuser, 8 Fed. 457.

Mercantile Trust Co. v. Rhode Island Trust Co., 36 Fed. 863.

Merriam v. Holloway Pub. Co., 43 Fed. 450.

The safe rule on a general demurrer to a bill in equity is that the demurrer must be overruled unless it appears that on no possible state of the evidence could a decree be made.

Failey v. Talbee, 55 Fed. 894.

“As the bill was demurred to, no dispute can be raised on the question of fraud.”

The U. S. v. Hughes, 11 How. 567.

A demurrer to a bill charging fraud, the facts being stated in the bill, must be overruled. The justice of a case cannot be got at on a demurrer.

Chrislip v. Teter, 27 S. E. 288, 291.

Rambo v. Rambo, 4 Desaus. (So. Ca.) 251, 254, 255.

Shearer v. Shearer, 50 Miss. 113, 117.

Cox v. Natl. Coal, etc., Co., 56 S. E. 494, 500.

Carter v. Longworth, 4 Ohio (Ham), 384, 386.

On demurrer to a bill in equity the court indulges every reasonable presumption in favor of the bill, and if, on examination of the facts stated therein, there is a possibility that the suit may be sustained, though upon a different ground from that assumed, a demurrer to the whole bill will be overruled.

State v. Standard Oil Co. of Ky., 110 S.W. 570.

Upon demurrer to a bill, the exhibits filed with the bill are to be read as part of it, and the statements found in them must be accepted as true against the demurrants.

Ulman v. Iaeger, 67 Fed. 980, 982.

On the demurrer to this bill the appellate court cannot consider anything which is not contained in the bill and the exhibits which are annexed to it.

Pacific R.R. of Mo. v. Mo. Pacific Ry. Co., 111 U. S. 518.

A demurrer cannot introduce, as its support, new facts which do not appear on the face of the bill and which must be set up by plea or answer.

Stewart v. Masterson, 131 U. S. 151, 158.

The credibility of statements contained in the bill cannot be impugned on a demurrer. This can be done only by a denial in an answer, or by proof offered against them.

Davis v. Tileston & Co., 6 How. 114, 118, 119.

THE COURT ERRED IN HOLDING THAT THE THIRD AMENDED BILL OF COMPLAINT DID NOT STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION AND TO ENTITLE PLAINTIFFS TO THE RELIEF SOUGHT, OR TO ANY RELIEF, AND IN RENDERING JUDGMENT IN FAVOR OF DEFENDANTS AND AGAINST PLAINTIFFS.

II.

THE SECRETING AND PURLOINING OF PLAINTIFFS' EVIDENCE WAS AN EXTRINSIC FRAUD FOR WHICH EQUITY WILL GIVE THE RELIEF ASKED.

The demurrer, by admitting the truth of the allegations in the bill, admits, among others, the following facts:

1. That these defendants conspired to procure in the "old suit" an unjust and untrue decree against these plaintiffs. (*Tr.* pp. 135, 107, 108, 134, 150, 151, 158, 183.)

2. That the decree in the "old suit" was an unjust and untrue decree which the court was deceived into making as a result of the conspiracy, perjury, the secreting and purloining of evidence and otherwise fraudulent management by these defendants of the former or "old suit." (*Tr.* pp. 183, 132, 133, 138, 139.)

3. That these plaintiffs did not commit the fraud that was alleged in the "old suit," and that said allegations of fraud were false and known to these defendants to be false. (*Tr.* pp. 127, 120-131, 133-138, 149-152.)

4. That these plaintiffs had an adequate and meritorious defense to the said allegations of fraud in the "old suit." (*Tr.* pp. 146, 147, 210, 211, 143, 144.)

5. That the said books and papers so wrongfully carried away, secreted and purloined by these defendants contain the evidence of this adequate and meritorious defense to the allegations of fraud in the "old suit." (*Tr.* pp. 146, 147, 151, 117, 119, 143, 144.)

6. That these defendants by the wrongful carrying away, secreting and purloining of the books and papers of the Berners Bay Company and of T. S. Nowell prevented these plaintiffs from making this adequate and meritorious defense in the "old suit." (*Tr.* pp. 150, 138, 139.)

7. That the said books and papers were wrongfully carried away by these defendants with the intent and purpose to prevent these plaintiffs from presenting to the trial court their adequate and meritorious defense in the "old suit." (*Tr.* pp. 138, 139.)

8. That because of the wrongful acts, conspiracy and perjury of these defendants there was no real, adversary contest on the merits in the "old suit." (*Tr.* p. 211.)

9. That these defendants falsely charged fraud in the "old suit" in order to evade or overcome the legal effect of their ten years of delay in pursuing their pretended rights. (*Tr.* p. 173.)

10. That these plaintiffs were the owners in fee simple of the said "Johnson Group." (*Tr.* p. 103.)

11. That the testimony in the "old suit" of Henry and William Endicott was perjured. (*Tr.* pp. 153-171. See p. 163.)

12. That the attorneys of these defendants so mismanaged the examination of T. S. Nowell as their own witness in the "old suit" and by their concealment and failure to show or exhibit to T. S. Nowell during his said examination any of the said books and writings then in their actual possession, that they thereby intentionally prevented T. S. Nowell from refreshing his memory and from making the explanation of the transaction which he would have been able to make had the said books and writings been shown him. (*Tr.* pp. 138, 139.)

13. That the conspiracy of these defendants was concocted to secure said unjust decree for the purpose of cheating and defrauding these plaintiffs out of their title to the said "Johnson Group." (*Tr.* p. 183.)

14. That the defective memory of T. S. Nowell resulted from the ten years of delay during which these defendants had slept upon their pretended rights, and from old age. (*Tr.* pp. 185, 199, 200.)

15. That owing to the laches of these defendants in pursuing their pretended rights these plaintiffs suffered, in the "old suit," the loss of the testimony

of Arthur L. Nowell, who had died in 1904, and who, as T. S. Nowell's confidential clerk and private secretary, had had personal charge of the details of the transaction in issue in the former suit, and who was the only other person besides T. S. Nowell who had had personal knowledge of the matters in issue in the "old suit." (*Tr.* pp. 185, 145.)

16. That T. S. Nowell's inability to defend resulted from two factors: (a) loss of recollection occasioned by old age and loss of a material witness, both of which conditions were brought about by the lapse of time for which these defendants are responsible, and (b) the preventing of his defense by the secreting and purloining by these defendants of his personal books in violation of his private rights and of the books and papers of the Berners Bay Company in violation of the rights of these plaintiffs as stockholders of that Company. (*Tr.* p. 185, 200, 201, 148, 149.)

17. That the purloining and secreting of these said books and papers of the said Berners Bay Company was done in violation of the fiduciary relation that existed between these defendants and these plaintiffs. (*Tr.* pp. 118, 95, 148, 149.)

18. That the meritorious defense which these plaintiffs had in the "old suit" was prevented by the fraud and conspiracy of these defendants unmixed with any fault or negligence in these plaintiffs or their agents. (*Tr.* p. 200.)

19. That these defendants, Endicott, Hackett, and all parties in interest, have admitted, recognized, confirmed and ratified the rightfulness of the title of these plaintiffs Nowell to the said "Johnson Group," and have done many acts expressly showing their

acquiescence in and recognition of the absolute title, both legal and beneficial, of these plaintiffs in and to the said "Johnson Group." (*Tr.* pp. 180, 181, 182.)

Therefore the case presented by this present bill possesses the following ingredients: (a) that it is a judgment which it is against good conscience to execute; (b) that these plaintiffs had a good defense to the decree in the former suit; (c) that they were prevented from making that good defense by the acts of their adversaries; (d) that by reason of their being prevented from making that good defense the judgment was obtained without any real adversary trial or decision of the issues on the merits as they in fact exist, and (e) that these plaintiffs have been guilty of no laches but have presented their case to the courts at the earliest possible opportunity after discovery of the facts constituting the said conspiracy and fraud.

"It may be safely said that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law; or of which he might have availed himself at law, but was prevented by fraud or accident unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery."

Marine Ins. Co. v. Hodgson, 7 Cranch, 336.

The United States Supreme Court has many times affirmed the foregoing principle.

"It is a general rule, too familiar to require any citation of authorities in its support, that 'a judgment, either of a legal or of an equitable tribunal, may be, in effect, vacated by a court of equity, if it was obtained by fraud.'"

2 Freeman on Judgments (4th Ed.), Sec. 489, p. 859.

The acts for which a court of equity will on account of fraud set aside or annul a judgment or decree, between the same parties, rendered by a court of competent jurisdiction, have relation to fraud, extrinsic or collateral, to the matter tried by the first court, and not to a fraud in the matter on which the decree was rendered, and which prevented a fair submission of the controversy.

U. S. v. Throckmorton, 98 U. S. 61.

The cases in which such relief has been granted are those in which, by fraud or deception practised on the unsuccessful party, he has been prevented from exhibiting fully his case, by reason of which there has never been a real contest before the court of the subject-matter of the suit.

U. S. v. Throckmorton, 98 U. S. 61.

The secreting and purloining of the testimony of an adversary is an extrinsic or collateral act for which equity will give relief against an unjust judgment or decree.

U. S. v. Flint, 25 Fed. Cas. 15,121, at p. 1111; 4 Sawy. 42.

Wherever one party by any contrivance prevents his adversary from having with him equal opportunities of producing his testimony and presenting his case before the courts, he commits a fraud upon public justice, which, resulting in private injury, may be the ground of equitable relief against the judgment recovered.

U. S. v. Flint, 25 Fed. Cas. No. 15,121, at p. 1111; 4 Sawy. 42.

A fraud was practised upon the court in the course of the litigation by which *a real litigation was prevented*, as distinguished from the fraud which was itself the subject-matter of the litigation. (Italics ours.)

U. S. v. Flint, 4 Sawy. 87, 25 Fed. Cas. No. 15, 121, at p. 1124.

The United States Supreme Court in the Throckmorton case (98 U. S. 61) affirmed the above-cited case of *U. S. v. Flint*.

The case of *Vance v. Burbank*, 101 U. S. 514, was appealed from the District of California. The rule in that case is stated as follows, at pages 519, 520:

“It has also been settled that the fraud, in respect to which relief will be granted in this class of cases, must be such as has been practised on the unsuccessful party and prevented him from exhibiting his case fully to the department, so that it may properly be said there has never been a decision in a real contest about the subject-matter of inquiry.”

The following remark of the Court at page 520 is significant as showing the opinion of the Court as regards the “secreting and purloining” of evidence being an act for which equity will give relief:

“No fraud is charged on the register and receiver, or on the heirs of Perkins, in respect to the keeping back of the evidence.”

Vance v. Burbank, 101 U. S. 520.

This is in line with *U. S. v. Flint*, *supra*. The United States Supreme Court in a later case expressed itself as follows on this point:

“If the [false and perjured] testimony was accompanied with acts *which prevented him*

from presenting to the court the merits of his case, or by which the jurisdiction of the court was imposed upon, he may also institute some direct proceeding to reach the judgment. U. S. v. Flint, 4 Sawy. 42; U. S. v. Throckmorton, 98 U. S. 61; Vance v. Burbank, 101 U. S. 514." (Italics ours.)

Steel v. St. Louis Smelting, etc., Co., 106 U. S. 454.

We find the case of *U. S. v. Flint* cited here in support of language which is clearly intended to include the act of "secreting and purloining the testimony of an adversary."

The foregoing cases show that the United States Supreme Court has affirmed the doctrine that the "secreting and purloining" of an adversary's evidence is an extrinsic fraud for which equity will give relief.

Marshall v. Holmes, 141 U. S. 589, holds that setting up a forged letter was sufficient fraud for equitable jurisdiction. It involved a right of removal to the Federal Courts of a suit to dissolve judgments which it was alleged had been "obtained on false testimony and forged documents," and that the false testimony and forgery were unknown to the appellant at the time of the trial. The relief asked was that the judgment be annulled and avoided as obtained upon false testimony and forged documents. At page 596 the Court said:

"According to the averments of the original petition for injunction filed in the state court — which averments must be taken to be true in determining the removability of the suit — the judgments in question would not

have been rendered against Mrs. Marshall but for the use in evidence of the letter alleged to be forged. The case evidently intended to be presented by the petition is one where, without negligence, laches, or other fault upon the part of the petitioner, Mayer has fraudulently obtained judgments which he seeks, against conscience, to enforce by execution. While, as a general rule, a defense cannot be set up in equity which has been fully and fairly tried at law, and although, in view of the large powers now exercised by courts of law over their judgments, a court of the United States, sitting in equity, will not assume to control such judgments for the purpose simply of giving a new trial, it is settled doctrine that 'any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery.' *Marine Ins. Co. of Alexandria v. Hodgson*, 7 Cranch, 332, 336; *Hendrickson v. Hinckley*, 17 How. 443, 445; *Crim v. Handley*, 94 U. S. 652, 653; *Metcalf v. Williams*, 104 U. S. 93, 96; *Embry v. Palmer*, 107 U. S. 3, 11; *Knox County v. Harshman*, 133 U. S. 152, 154; 2 Story Eq. Jur., Secs. 887, 1574; *Floyd v. Jayne*, 6 Johns. Ch. 479, 482; See also *U.S. v. Throckmorton*, 98 U. S. 61, 65."

After examining the cases of *Barrow v. Hunton*, 99 U. S. 80, *Gaines v. Fuentes*, 92 U. S. 10, *Johnson v. Waters*, 111 U. S. 640, and *Arrowsmith v. Gleason*, 129 U. S. 86, the Supreme Court reversed the judgment

of the lower court and held the case to be one of which the Circuit Court could rightfully take cognizance and determine upon final hearing whether upon the allegations and proof a case was made which according to established principles of equity entitled the appellant to relief against the judgments alleged to have been fraudulently obtained. (*Marshall v. Holmes.*)

It must be accepted that the case of *Marshall v. Holmes* is another example of the exception to the rule laid down in the Throckmorton case under which a court of equity will grant relief against a fraudulent judgment or decree. There is alleged in this present bill more than false testimony and forged documents. In addition to the false testimony and the production of false documents, there is alleged a conspiracy to prevent these plaintiffs from presenting their meritorious defense to the court in the former suit. So to the requirements deemed sufficient in *Marshall v. Holmes* we have here the added conspiracy to prevent a meritorious and adequate defense. It is to be noticed that the case of *Marshall v. Holmes* approvingly cited the Throckmorton case.

The courts of this Ninth Circuit have said that *Marshall v. Holmes* is not now regarded as in conflict with the Throckmorton case.

Nelson v. Meehan, 155 Fed. 1.

U. S. v. Aakervik, 180 Fed. 144.

Hunt, District Judge, in *Nelson v. Meehan*, *supra*, at pages 6, 7, said:

“More than 12 years after the Throckmorton Case and *Vance v. Burbank*, *supra*, the Supreme Court, in 1891, decided *Marshall*

v. *Holmes*, 141 U. S. 589, 12 Sup. Ct. 62, 35 L. Ed. 870, which is not infrequently relied upon as modifying the doctrine of the two earlier cases cited. Evidently the court itself did not intend the decision to be a modification, inasmuch as the opinion refers to the Throckmorton Case to sustain the rule that while generally a defense cannot be set up in equity which has been fully and fairly tried at law, still equity will regard an application to grant relief against a judgment which it is against conscience to execute, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law but was prevented from so doing by fraud or accident, unmixed with any fraud or negligence in himself or his agents. The implication from the court's discussion seems to be that where there has been a trial and judgment after full opportunity was given for the introduction of evidence, and no extrinsic or collateral fraud has occurred, the general rule should prevail."

The admitted allegations of this bill show how far removed the former trial was from a "full opportunity" to introduce evidence, and how these plaintiffs were prevented from availing themselves of their meritorious defense.

In *Graver v. Faurot*, 76 Fed. 257, a false sworn answer was held to be a fraud for which equity would give relief. It was held to be a "positive and actual fraud" both upon the complainant and on the court, and "in reason and good conscience a decree obtained as this one is alleged to have been ought to be annulled." (Reversing 64 Fed. 241.)

Commenting on *Graver v. Faurot*, Judge Hunt, 155 Fed. 7, said:

“An appeal was taken, and the Circuit Court of Appeals of the Seventh Circuit reversed the case upon the ground that it was not one within the spirit or reason of the decisions of the Supreme Court cited, inasmuch as there never was a trial in *Graver v. Faurot*, the complainant having failed to reply to the answer, and the case having been submitted with the answer as conclusive proof. The Court points out that there was no conflict or weighing of evidence, but decree went as a matter of course and the decision turned upon the point that the case was one of fraud that was extrinsic and collateral, distinct from and antecedent to the use of the answer at the hearing.”

In this present appeal there is added to the perjured testimony of the Endicotts in the “old suit” the extrinsic and collateral fraud of a conspiracy to “purloin and secrete” the evidence of these plaintiffs with the intent and purpose to prevent them from presenting their adequate and meritorious defense to the trial court in the “old suit.” (*Tr.* pp. 138, 139, 133, 134.) The actual result was that in the “old suit” the trial was robbed of every atom of adversary character. There was no weighing of evidence for the reason that these defendants “purloined and secreted” all the books and papers that contained the evidence of the meritorious defense of these plaintiffs and thereby prevented this meritorious defense from being presented to and considered by the trial court.

This conspiracy and fraud was extrinsic and collateral, antecedent to and entirely distinct from the

state of facts passed upon by the trial court in the "old suit." (Incidentally we submit that this foregoing principle is conclusive against defendants' contention that the issues involved in this appeal are "*res judicata*.")

The case of *Holton v. Davis*, 108 Fed. 138, was one of an alleged conspiracy between one of the parties and outside persons, consisting among other things of failure to cross-examine witnesses, failure to introduce certain evidence, and inducing witnesses to go out of the jurisdiction. The evidence was held insufficient to sustain the allegations. This Court of Appeals at page 149 said:

"Although all the charges are made on information and belief, they are couched in language direct, positive, and clear, and, if proven as charged, would necessarily demand and receive from this court the severest condemnation that language affords to all parties concerned therein, irrespective of their standing and position in the community where they reside, *and the relief asked for should be granted without any hesitation.*" (Italics ours.)

This Court of Appeals cited the Throckmorton case in the case last cited, and it is not to be inferred that it intended to go beyond the correct rule to be deduced therefrom. (See 155 Fed. 10.)

We submit that the facts alleged in this bill present a stronger case for appellants than the facts alleged in *Holton v. Davis*, *supra*, yet this Court of Appeals in the *Holton* case said it would not hesitate to grant the relief asked for upon proof of the allegations.

The case of *Nugent v. Metropolitan St. Ry. Co.*, 61 N. Y. Supp. 476, was an appeal by the defendant railway from an order denying a motion for a new trial upon the ground of newly discovered evidence showing perjury and a conspiracy to obtain the judgment. The order appealed from was reversed and the motion granted.

At. p. 479 (61 N. Y. Supp.) and p. 105 (46 App. Div.) the Court said:

“But it is urged that a judgment will not be vacated merely because it is based upon or procured by perjured testimony. This undoubtedly is the general rule, *but in the present case there is something more than that*. We have here, in addition to the perjured testimony, the fact that it was inspired and manufactured by one of the plaintiff’s attorneys; that he entered into a conspiracy with the witnesses for the purpose of obtaining a judgment, thereby committing a fraud upon the court. The object of a trial is to do justice, and whenever it is made to appear that one of the parties to the litigation has, by fraud, connivance, conspiracy or any other dishonest act, prevented his adversary from having a fair trial, then the court never hesitates to use the power which it possesses to rectify that wrong by vacating the judgment obtained, and directing a new trial. (*Ver Planck v. Van Buren*, 76 N. Y. 247; *Jordan v. Volkenning*, 72 *id.* 300; *Keister v. Rankin*, 34 App. Div. 288) * * * In *Ver Planck v. Van Buren* (*supra*) Judge Rapallo said: ‘Fraud and imposition invalidate a judgment, as they do all acts.’ And in *Patch v. Ward* (L. R. 3 Ch. App. 203) it is said that there must be

actual fraud, 'Such that there is on the part of the person chargeable with it the *malus animus*, the *mala mens* putting itself in motion and acting in order to take an undue advantage of some other person for the purpose of actually and knowingly defrauding him. * * * *A meditated and intentional contrivance to keep the parties and the court in ignorance of the real facts of the case, and obtaining that decree by that contrivance.'*

"Any fact which satisfies the court that a judgment has been obtained by fraud or deceit, or that the party against whom the judgment was taken was prevented by fraud or deceit from having a fair trial, is in and of itself sufficient to call for interference by the court. (*Ins. Co. v. Hodgson*, 11 U. S. 332; *Vaughn v. Johnson*, 9 N. J. Eq. 173.)" (Italics ours.)

Judge Hunt in 155 Fed. 10, said concerning the Nugent case that it was conceded by the court that a judgment will not be vacated merely because it is based upon or procured by perjured testimony, but

"it was shown that the case was taken out of the general rule by the added fraud of a conspiracy."

So in the case at bar these plaintiffs are not relying alone upon the perjured testimony of the Endicotts to set aside the former decree, but they are relying upon the "added fraud of a conspiracy" to "secrete and purloin" T. S. Nowell's evidence for the express purpose of preventing his defense to their fraudulent and unjust suit. This "added fraud of a conspiracy" takes this appeal out of the general rule.

In *Dunlap v. Steere*, 92 Cal. 347, De Haven, Judge, in discussing the Throckmorton case said:

“The case just mentioned was one in which a retrial of an action which had been once fully tried was asked, and can have no kind of bearing here, where the plaintiff never had his day in court, *or any opportunity to make his defense* to the false and fraudulent claim upon which the judgment against him was based.” (Italics ours.)

That is the point exactly. These plaintiffs-appellants as defendants in the “old suit” never had “any opportunity to make their defense to the false and fraudulent claim upon which the judgment against them was based.” They were deprived of that opportunity or power, by the fraudulent acts of these defendants in “secreting and purloining” their evidence. (*Tr.* pp. 133, 134, 138, 139, 148, 149, 150, 151.)

It is alleged and admitted by the demurrer that these defendants by the carrying away, secreting and purloining of the evidence of T. S. Nowell prevented him from making a meritorious defense in the former suit. (*Tr.* p. 150.) The allegations of the present bill show in great detail what that defense was. That defense is absolute and conclusive. It shows that the “Johnson Group” was never offered to and accepted by the Company; that the offer was not fraudulently interlined; that the records of the Company are true and correct; and that the alleged contract decreed to be specifically performed was never made or intended to be made. (*Tr.* p. 144.) These defendants fraudulently prevented that defense by “secreting and purloining” the evidence of T. S. Nowell. (See *U. S. v. Flint.*)

The case of *U. S. v. Flint, supra*, holds that the “secreting and purloining” of the evidence of an adversary is an extrinsic and collateral fraud against which equity will give relief.

Mr. Justice Field of the United States Supreme Court wrote the opinion in *U. S. v. Flint* cited from. The United States Supreme Court affirmed the Flint case in *U. S. v. Throckmorton*, 98 U. S. 61. On the authority of *U. S. v. Flint* alone these plaintiffs are entitled to a reversal of the decree of the lower court, and *a fortiori* when that case in *U. S. v. Throckmorton* has been affirmed by the Supreme Court of the United States without qualification.

The fraud in the “old suit” was “practised on the unsuccessful party.” The fraud or concealment “prevented them from exhibiting fully their case.” The result of the fraud was that “there has never been a real contest in the trial or hearing of the case.” “There was, in fact, no adversary trial or decision of the issues in the case” for the reason that these defendants had fraudulently deprived these plaintiffs of their defense by secreting their evidence. These defendants by their “contrivance prevented these plaintiffs from having with them equal opportunities of producing their testimony and presenting their case before the court” by reason of the fact that these defendants “secreted and purloined” the evidence of T. S. Nowell, which contained the proofs of his meritorious defense. As was said in the Flint case (*supra*), “A fraud was practised upon the court in the course of the litigation by which a *real litigation was prevented*, as distinguished from the fraud which was itself the subject-matter of the litigation.” (Italics ours.) We cannot advocate

the cause of these plaintiffs-appellants more forcefully than by repeating the above *verbatim* citations of the principles laid down by the eminent judges who wrote the opinions in the cases hereinbefore cited. Those cases demonstrate the proposition contended for, that the acts alleged against these defendants-appellees in this present bill constitute an "extrinsic or collateral" fraud for which a court of equity will give relief against the decree so obtained. The added conspiracy and fraud alleged in this present appeal were not in any way involved in the issues of the "old suit," were not "a fraud in the matter on which the decree was rendered." This conspiracy and fraud "prevented a fair submission of the controversy." (Throckmorton case.)

The conspiracy and fraud alleged herein were not put in issue in the pleadings in the "old suit," the facts constituting the same were not brought out in evidence, argued by counsel, or passed upon by the trial court in the "old suit." This conspiracy and fraud alleged herein were entirely unknown to these plaintiffs-appellants at the time the "old suit" was brought by these defendants-appellees. (*Tr.* p. 137.) This conspiracy and fraud cannot, under such circumstances, be considered as intrinsic to the merits of the "old suit." A conspiracy and fraud that is totally unknown to and undiscovered by the parties who are the helpless victims of the same cannot be put in issue and thereby made "intrinsic" to the merits of the case in which the conspiracy and fraud is perpetrated. It is therefore plain that the conspiracy and fraud of "purloining and secreting" the evidence of these plaintiffs-appellants and thereby preventing them from making an adequate and meritorious defense in the "old suit"

is an "extrinsic and collateral" fraud for which equity will give relief against the decree so obtained.

Other cases cited in this brief interpreting the rule laid down in the Throckmorton case give further support to this contention of plaintiffs-appellants.

These plaintiffs are not relying upon the perjured testimony alone as a ground for granting them the relief prayed for. The cases of mere perjury of which *Pico v. Cohn*, 91 Cal. 129, is a leading one, do not apply. In *Pico v. Cohn* (p. 134) the fraud committed was the production of perjured evidence alone, which the court considered and believed. In this present appeal the fraud committed, in addition to the perjury, was the then unknown "secreting and purloining of the evidence of an adversary." (*Tr.* p. 201.) There is a vast difference between procuring a decree on perjured evidence alone which the court had considered and believed and procuring a decree by means of perjury coupled with the undiscovered "secreting and purloining of the evidence of an adversary" which if produced would have changed the result of the suit. The case of *Nelson v. Meehan*, 155 Fed. 1, is one of the *Pico v. Cohn* class of cases and it draws the distinction between a case of perjury and no more that has been passed upon and believed by the court and the case of a conspiracy added to the perjured testimony. The present appeal is a case of perjury coupled with the prevention of a meritorious defense by means of a conspiracy and the wrongful carrying away and concealment and suppression of the evidence containing that meritorious defense. The perjured testimony of the Endicotts in the "old suit" is *but one* of the ingredients of this case, as showing the conspiracy and fraud in addition thereto,

therefore to the perjury of the Endicotts in the "old suit" there is in the present case the added conspiracy and fraud of these defendants, by means of which added conspiracy and fraud the trial court in the "old suit" was deceived into making the untrue and unjust decree it did make in the "old suit." Therefore the cases of *Pico v. Cohn* and *Nelson v. Meehan* and the class to which they belong do not apply to this present appeal except in so far as they recognize the principle that the added conspiracy to the perjury takes this case out of the general rule laid down in *Pico v. Cohn* with reference to cases of perjury and perjury alone. This present appeal is one disclosing "extrinsic or collateral" fraud, noted as an exception to the general rule for which *Pico v. Cohn* stands.

The perjury is material as throwing light on the alleged fraudulent scheme to put it out of the power of these plaintiffs to defend the action in the original suit, as showing a motive for that scheme and the fraudulent practices in carrying it out, as tending to show the fraudulent intent of these defendants in those practices, and as giving a coloring to their prior acts, all of which are matters to be considered on the trial of the action.

Colby v. Colby, 61 N. W. 461.

In *Pearce v. Olney*, 20 Conn. 544 (cited in *U. S. v. Throckmorton*, 98 U. S. 61 at 66), the Court, at p. 554, said:

"It is well settled, that this jurisdiction will be exercised, whenever a party, having a good defense to an action at law, has had no opportunity to make it, or has been prevented, by the fraud or improper management of the other party, from making it, and by reason

thereof, a judgment has been obtained, which it is against conscience to enforce. Indeed, this falls directly within, and is but an illustration of, the general rule, that equity will interfere to restrain the use of an advantage gained in a court of ordinary jurisdiction, which must necessarily make that court an instrument of injustice, in all cases where such advantage has been gained, by the fraud, accident or mistake of the opposite party.” (Italics ours.)

In *Smith v. Worthington*, 53 Fed. at p. 981, interpreting the rule in the Throckmorton case, the court said:

“It must appear that, in obtaining the judgment complained of, fraud has been practised upon the court rendering the judgment, or upon the party complaining of the judgment, whereby he was prevented from appearing or being heard, or *was kept in ignorance of some material matter*, and thereby prevented from properly securing his rights.” (Italics ours.)

Judge Wolverton, in *U. S. v. Aakervik*, 180 Fed. 143, interpreting the rule in the Throckmorton case, said:

“These and similar cases which go to indicate that there has never been *any real contest* in the trial or hearing of the case, afford grounds for impeachment by suit instituted directly for that purpose.” (Italics ours.)

That is exactly what we are contending for,—that the fraudulent “secreting and purloining” of T. S. Nowell’s evidence by these defendants prevented “any real contest in the trial or hearing of the case,” which fact

“affords grounds for impeachment” of the former decree.

In *Electric Plaster Co. v. Blue Rapids City Tp.*, 106 Pac. 1081, citing the Throckmorton case and *Pico v. Cohn*, the Court said:

“By the expression ‘Extrinsic or collateral fraud’ is meant some act or conduct of the prevailing party which has prevented a fair submission of the controversy.” * * * “Where the alleged perjury relates to a question upon which there was a conflict, and it was necessary for the court to determine the truth or falsity of the testimony, the fraud is intrinsic, and is concluded by the judgment, unless there be a showing that the jurisdiction of the court has been imposed upon, or *that by some fraudulent act of the prevailing party the other side has been deprived of an opportunity for a fair trial.*” (Italics ours.)

That citation states our contention with precision.

Owing to the “secreting and purloining” of the evidence of T. S. Nowell the proceedings at the trial of the “old suit” were no more than an *ex parte* hearing. The only evidence offered was put in by complainants. These plaintiffs had no evidence to offer in the “old suit.” (*Tr.* p. 141.) These defendants had secreted and suppressed everything that was favorable to T. S. Nowell, after having abused his confidence and trust and taken his evidence away from him without his knowledge, consent or recollection. The carrying away and secreting of the said books and papers was wrongful in the first place (*Tr.* p. 141), and, secondly, it was done with the fraudulent intent to prevent these plaintiffs Nowell from presenting their

meritorious and adequate defense in the "old suit." (*Tr.* pp. 134, 138, 139.) This was a "fraudulent act of the prevailing party," by which "fraudulent act" these plaintiffs-appellants were "deprived of an opportunity for a fair trial." For these reasons the trial in the "old suit" was a farce, a mere form, in effect an *ex parte* proceeding controlled and mismanaged by these defendants against which control and mismanagement these plaintiffs were powerless and helpless. (*Tr.* pp. 138, 139.) Under such circumstances the facts of the appeal at bar come within the rule laid down in *U. S. v. Minor*, 114 U. S. 233, 243:

"But in proceedings like the present, wholly *ex parte*, no contest, no adversary proceedings, no reason to suspect fraud, but where the patent is the result of nothing but fraud and perjury, it is enough to hold that it conveys the legal title, and it would be going quite too far to say that it cannot be assailed by a proceeding in equity and set aside as void, if the fraud is proved and there are no innocent holders for value."

There are no innocent holders for value, as this present "new suit" was brought before foreclosure of the mortgage of the Berners Bay Company. See *Nowell v. International Trust Co.*, 169 Fed. 497.

In the "old suit" there was no real contest, and the claimants (these defendants) produced without opposition their *ex parte* proofs of their side of the case. The proofs were all in the possession of these defendants, because they had wrongfully taken them away and secreted them. (*Tr.* p. 132.) They were therefore able to produce what they desired to produce

and to suppress what they wished to suppress. These plaintiffs had nothing to produce except the corporate records. (*Tr.* p. 139.) Everything else had been taken away without the knowledge of these plaintiffs. (*Tr.* p. 115.) Therefore, in effect, owing to and on account of the wrongful acts of these defendants the trial of the original suit was no more than an *ex parte* proceeding, wherein these plaintiffs were deprived of all opportunity of presenting their side of the case. (*Tr.* pp. 138, 139, 141, 188.)

To all outward appearances there was a judicial trial on the merits in the "old suit," but as a matter of fact there was no judicial trial in so far as "judicial trial" imports a fair and unrestricted opportunity to present both sides of the case. To be sure, these plaintiffs were represented by counsel, witnesses were examined and cross-examined and evidence submitted. But in substance and effect the trial was a mere farce, a cut-and-dried affair. As far as these plaintiffs were concerned they might just as well have never appeared or testified in that suit. There was no adversary proceeding. There was no real contest. (*Tr.* p. 211.) These defendants were able to present or withhold whatever evidence they chose to present or withhold, and they fraudulently exercised that power. These plaintiffs had no means of controverting the evidence and testimony that was offered or of establishing their defense. (*Tr.* pp. 141, 133.) In the words of the Supreme Court it may be justly said that

"Surely the doctrine applicable to the conclusive character of solemn judgment of courts, with full jurisdiction over the parties and the subject-matter, made after appear-

ance, pleadings, and contests by parties on *both sides*, cannot be properly applied to the proceedings in the land office in such cases.” (Italics ours.)

U. S. v. Minor, 114 U. S. 242, 243.

That doctrine cannot be held applicable to a judgment or decree obtained under the circumstances and by means of the fraud and deception that was practised and perpetrated by these defendants-appellees in the “old suit.” If ever the maxim, “*Fabula, non iudicium, hoc est; in scena, non in foro, res agitur*” (*U. S. v. Flint*), applied to a case, it applies to this case.

U. S. v. Minor, 114 U. S. 233, reversed the decision of *U. S. v. Minor*, 26 Fed. 672, the Circuit Court relying upon the Throckmorton case. The Circuit Court said that it

“did not feel entirely certain that the doctrine established in *U. S. v. Throckmorton*, 98 U. S. 68; *Vance v. Burbank*, 101 U. S. 519; and *Smelting Co. v. Kemp*, 104 U. S. 640, has not been carried too far.” (pp. 672, 673.)

The facts alleged in this bill bring this case within the rule laid down in the case of *Moffatt v. U. S.*, 112 U. S. 24. In that case land officers, by a fraudulent conspiracy, presented fabricated documents, with their judgment to their superior officers having appellate and supervising authority in such matters, thus imposing a fictitious proceeding on them as one that had taken place. *Held*, that it was a fraud upon the jurisdiction of the land department, and not the mere presentation of doubtful and disputed testimony.

In the present case the attorneys for these defendants in the "old suit" were officers of the District Court, *Treat v. Tolman*, 113 Fed. 892, 894, and answerable to it for the proper performance of their professional duties, *Clark v. Willett*, 35 Cal. 534, 539, one of which is to maintain and uphold the dignity of the court, *Morrison v. Snow*, 72 Pac. 924, 930, and behave towards it with all due fidelity, case of Austin, 5 Rawle, 191, 28 Am. Dec. 657. These attorneys, officers of the court, entered into a fraudulent conspiracy with their clients to present to the court fabricated or fictitious documents, or documents that were *functus officii*, and by means of false pleadings and perjured testimony to practise upon the trial court a fraud upon its jurisdiction by imposing a fictitious suit upon it which they knew had no foundation in fact or law or equity. (*Tr.* pp. 134, 210, 211, 144, 149, 151.) It was not the mere presentation to the court of doubtful and disputed testimony. It was a conspiracy to impose a fictitious proceeding upon the court as one which had a foundation in fact and in law. They succeeded in imposing this fictitious suit upon the court, whereas the court, had it not been deceived into taking jurisdiction, would have dismissed the "old suit" for want of equity. (*Tr.* pp. 151, 211.) This was a fraud upon the jurisdiction of the court within the rule laid down in the Moffatt case, for which the decree in the "old suit" should be set aside.

This brings us to another reason for reversing the decree of the lower court. It is alleged in this bill that the acts of these defendants and their attorneys prevented T. S. Nowell from making a meritorious and adequate defense to the "old suit."

It is well settled that keeping a party from court, or keeping him in ignorance of a suit and thereby preventing him from defending it, is proper ground for relief in equity against an unjust judgment. *U. S. v. Throckmorton*, 98 U. S. 61.

By demurring to the bill these defendants have admitted that they prevented these plaintiffs from making an adequate and meritorious defense in the original suit. In a judicial proceeding the defense is the thing so far as defendant is concerned. The mere physical presence of the defendant is an incidental detail of no consequence whatever. So long as the meritorious defense is made, is presented to the court, it matters not in a civil suit where the defendant may be. If he is *in court* and does not present his defense, nothing having been done by the other side to prevent him, he loses; if he is away from court, and his meritorious defense is properly presented, he does not lose. So the physical presence of the defendant in court at a civil trial is immaterial, so long as his meritorious defense is properly presented. Therefore *the defense* is the vital element for defendant. If that defense is prevented by the act of the successful party, the vital, living, essential element of the defendant's side of the case has been eliminated and kept from the knowledge of the court. The defendant is thereby prevented from defending or making any contest on the merits, and the proceedings are reduced to the level or *status* of an *ex parte* affair, which defect the mere physical presence of the defendant in court cannot cure. Where the defendant is kept in ignorance of his defense by means of the overt act of concealment of evidence or other fraud of the successful party, the defense

being the essential element in the defendant's case, it matters not whether he is kept in ignorance of that meritorious defense because of the concealment from him of the whole proceeding or, having full notice of the proceeding, all knowledge of his meritorious defense is kept from him by means of the premeditated "secreting and purloining" of the evidence of this meritorious defense. Cases are to be found by the hundred holding that preventing a defense by keeping a defendant away from court, or keeping him in ignorance of the proceedings, is good ground to set aside an unjust decree. The point contended for is that these defendants having prevented in the "old suit" the meritorious defense, the essential and vital element of these plaintiffs' case, it is immaterial that these plaintiffs had notice and knowledge of the former farcical proceedings, — farcical because entirely *ex parte* in spirit, in effect and in fact. Having actually prevented the defense, these defendants should be held to have practised a fraud for which equity will give relief, regardless of the mere physical but helplessly unenlightened presence in court of these plaintiffs, since the essence and spirit of the legal wrong of keeping them away from court or of keeping from them all knowledge of the proceedings was perpetrated upon these innocent plaintiffs by means of the fraudulent "secreting and purloining" of the evidence of these plaintiffs constituting and containing the means of absolute and conclusive proof of their entire innocence of the fraud alleged in the "old suit." This line of argument is merely an elaboration of the doctrine laid down in *U. S. v. Flint* and other cases herein cited, which hold that the concealment of an adversary's

evidence is a wrong for which a court of equity will give relief. The immediate purpose of this contention, however, is to show that the acts done by these defendants in the carrying out of their conspiracy to defraud these plaintiffs, bring this present appeal well within the reasoning of the legion of cases where the defense was prevented by keeping the defendant physically away from court or by keeping him in ignorance of the proceedings, and which cases held such acts to be just ground for relief in equity. The actual result is the same whether the defendant is kept in ignorance of the proceedings themselves or whether he is kept in ignorance of the facts constituting his defense. He is in either case prevented from presenting his meritorious defense. To hold that there is any difference or distinction in law would be to juggle with mere terms at the expense of justice for the benefit of wrong-doers. It is to say that water is water, but that H_2O is not water because not expressed in the same terms. For these reasons we submit that this case is in line with the reasoning of the cases in which the defense was prevented by the physical keeping away of defendant from the court or by the failure to notify him of the proceedings and held to be just ground for voiding a decree since in all three cases that equality of opportunity of presenting one's side on its merits is destroyed to the damage of the defendant and the proceeding is thereby turned into a mere farce, a piece of acting.

Where a party has been prevented by the fraud or the fraudulent management of his adversary from presenting a meritorious defense fairly to the trial court and having it properly considered, a court of

equity will set aside and annul the decree so founded on fraud.

Harding v. Hawkins, 141 Ill. 572, 582.

Where defendants in the former action had no knowledge of the existence of some matter of defense and their want of such knowledge is not inconsistent, as here, with reasonable diligence on their part, and particularly where the defense was especially in the knowledge of their adversaries, and the latter may be regarded as acting in bad faith in not disclosing it, or in taking judgment when they knew that a complete defense existed and that it was not presented because unknown to the defendant, they may obtain relief in equity from the judgment.

The Cairo & Fulton R.R. Co. v. Titus, 28 N.J. Eq. 269.

Merrill v. First National Bank, 94 Cal. 59, 62.
Cox v. Mobile & Girard R.R. Co., 44 Ala. 611, 615.

Melick v. First Natl. Bank, 52 Iowa 94.

C. & E. I. R.R. Co. v. Hay, 119 Ill. 493, 504, 506.

Hart v. Bates, 17 So. Ca. 35, 44.

Ferrell v. Allen, 5 W. Va. 43.

See also

Marshall v. Holmes (*supra*).

Graver v. Faurot (*supra*).

If a party against whom a judgment has been had was not informed of the existence of a defense in time to avail himself of it, and was not able to procure the evidence requisite to establish it and has not been guilty of laches, equity will interfere on discovery after judgment of evidence establishing beyond the possi-

bility of reasonable controversy that the judgment against him ought not to be enforced.

Brown v. Luehrs, 79 Ill. 575.

McGehee v. Gold, 68 Ill. 215.

Where there is a fraudulent concealment in connection with the perjury equitable relief will be granted.

Sohler v. Sohler, 67 Pac. 282, 284.

In *Curtis v. Schell*, 61 Pac. (California) 951, 953, it was held that the suppression of a material fact was an extrinsic fraud taking the case out of the rule in the Throckmorton case, which was cited.

In addition to the cases hereinbefore cited, the following-named cases are also relied upon by these plaintiffs-appellants as showing specific instances in which decrees have been vacated and annulled for fraud, and as exemplifying the ever-varying circumstances under which courts of equity will vacate and annul decrees for fraud, and as showing that where it is against conscience to enforce an unjust and unconscionable decree courts of equity will not and do not hesitate to vacate the fraudulent decree and restore the injured and innocent party to his former position.

Graver v. Faurot, 76 Fed. 257.

Young v. Sigler, 48 Fed. 182.

Taylor v. R. R., 86 Tenn. 229, 240, 241, 6 S. W. 393 (opinion by Mr. Justice Lurton).

Mosby v. Gisborn, 54 Pac. 121, 128, citing Throckmorton case.

Schwaman v. Truax, 103 Am. St. R. 832, 837, 838, 839, 71 N. E. 464.

Crosby v. Buchanan, 90 U.S. 420, 457. (23 Wall.)

Ocean Ins. Co. v. Fields, 2 Story, 75.
Currier v. Esty, 110 Mass. 536.
Keyes v. Brackett, 187 Mass. 306.
Sargent v. Baubleis, 127 Ill. App. 631.
Graves v. Graves, 109 N. W. 707, 709, discussing Throckmorton case.
McMurray v. McMurray, 67 Texas, 665.
Griffith v. Merchants' Life Association, 127 N. W. 1079.
Guild v. Phillips, 44 Fed. 461.
Daleschal v. Geiser, 13 Pac. 595.
Shinkle v. Letcher, 47 Ill. 216.
Ullman, Einstein & Co. v. Effinger, 11 Ohio C. C. (N. S.) 383. (Aff'd 60 Ohio St. 579.)
Howell v. Randle, 54 So. 563.
Ewing v. Lamphere, 111 N. W. 187.
Ward v. Town of Southfield, 102 N. Y. 287, 293, citing Throckmorton case.
Trefy v. Knickerbocker Life Ins. Co., 8 Fed. 177, 181.
 6 Pomeroy Eq. Jur., Secs. 647, 648, 649.
 Bigelow on Fraud, p. 89.

III.

THE FRAUD COMMITTED WAS IN BREACH OF A FIDUCIARY RELATION FOR WHICH EQUITY WILL GIVE RELIEF.

The plaintiffs T. S. Nowell and Willis E. Nowell were large stockholders of the said Berners Bay Mining and Milling Company (*Tr.* p. 149), and the defendants Henry Endicott, Hackett and Fairchild as directors in said Company (*Tr.* p. 95) occupied a fiduciary

relation towards the said T. S. Nowell and Willis E. Nowell as such stockholders.

Directors are treated by courts of equity as trustees for the stockholders and are bound to exercise nothing short of the *uberrima fides* of the civil law.

10 Cyc. 787.

Twin-Lick Oil Co. v. Marbury.

91 U. S. 587, 588, 589.

Corbett v. Woodward, 5 Sawy. 403. 299

Drury v. M. & S. R.R. Co., 7 Wall. 269, 302.

2 Cook on Corporations (5th Ed.) Sec. 648, p. 1453.

Helliwell on Stocks and Stockholders, Sec. 254, pp. 462, 463.

Bosworth v. Allen, 168 N. Y. 157, 164, 165 and cases.

Center Creek Water, etc., Co. v. Lindsay, 60 Pac. 559, 561 and cases.

Jackson v. Ludeling, 21 Wall. 616.

“The shares of the capital stock are usually represented by certificates. Every holder is a *cestui que trust* to the extent of his ownership.”

Farrington v. Tennessee, 95 U. S. 687.

The directors are the trustees or managing partners, and the stockholders are the *cestui que trustent*.

Koehler v. Hubby, 67 U. S. 721, citing cases.

Kean v. Johnson, 9 N. J. Eq. 407.

Farmers' Loan & Trust Co. v. San Diego St. Car Co., 45 Fed. 518, 527.

1 Morawetz on Corporations, Sec. 237.

A corporate director is a trustee for all members of the corporation.

Bird Coal & Iron Co. v. Humes, 27 Atl. 750, 752.

A stockholder has the right to inspect the corporate books.

Ranger v. Champion Cotton Press Co., 51 Fed. 61, 62.

Chable v. Nicaragua, etc., Co., 59 Fed. 846.

Matter of Steinway, 159 N. Y. 250.

An indefinite delay in according this right is equivalent to a denial of it.

Cobb v. Lagarde, 30 So. 326, 328.

A stockholder has the right to inspect the corporate books to secure facts in his favor regarding litigation.

Re Burton & S. Co., 31 L. J. Q. B. (N. S.) 62.

Where a fiduciary relation exists, concealment of facts is a fraud against which a court of equity will grant relief.

***Humphreys v. Burleson*, 72 Ala. 1, 6, — citing Throckmorton case.**

H. Endicott, Hackett and Fairchild were directors of the Berners Bay Company (*Tr.* p. 95), of which Company T. S. and Willis E. Nowell were the majority stockholders. (*Tr.* p. 149.)

In *Nowell v. McBride*, the appeal of the "old case," reported in 162 Fed. 432, at 441, this court speaks of the fiduciary relations that exist between the president and stockholders of a corporation. It cannot be that this relation of trust and confidence is all on one side, and that the president and majority stockholder of

the corporation has no right to expect that his directors and other stockholders will deal with him on the same basis of "candor" and honesty as he is required to deal with them. If there existed a fiduciary relation between T. S. Nowell as president of said Company and Henry Endicott as a stockholder (who was also a director) in January, 1906, in Endicott's favor in the "old suit," there existed in said January, 1906, also a fiduciary relation between these above-named defendants Endicott, Hackett and Fairchild as directors of said Company and these plaintiffs in favor of the latter. It is a poor rule that does not work both ways. If, as a matter of law, T. S. Nowell was bound in the "old suit" by the obligations of his fiduciary relation as president and director towards the above-named defendants as stockholders, then it must be as matter of law that identical fiduciary obligations rested in the "old suit" upon the said H. Endicott, Hackett and Fairchild as directors in said corporation towards T. S. and W. E. Nowell as stockholders therein. This conclusion is inevitable. These said defendants are liable for the acts of their agents and co-conspirators Corning and Gillespie, performed in the carrying out of the general scheme of the conspiracy, — therefore when these said defendants fraudulently schemed and conspired wrongfully to deprive the said Nowells of their title to the said "Johnson Group" by means of an unjust, untrue, unconscionable decree fraudulently obtained and in pursuance of said scheme and conspiracy, wrongfully carried away and "secreted and purloined" the said various books and papers contrary to their clear and undoubted fiduciary obligations and duties towards the said Nowells, their acts constituted

a concealment in breach of a fiduciary relation for which equity will give relief.

On the admitted allegations of the bill, there was no real defense made in the "old suit," and the present plaintiffs were prevented from making that defense by the unfaithful conduct of the directors of the Berners Bay Company. A case of that kind is one of which a court of equity will take cognizance.

Pacific R.R. of Mo. v. Mo. Pac. Ry., 111 U.S. 520,
citing *U. S. v. Throckmorton*, 98 U. S. 61.

In the case last cited the defense was prevented by the hostile control of the directors. In the appeal at bar the defense was prevented by the hostile control of the said directors, H. Endicott, Hackett and Fairchild, over the Company's books and those of T. S. Nowell, whereby they were concealed and suppressed and kept from all knowledge of these plaintiffs, and their defense thereby prevented. (*Tr.* p. 150.)

Therefore, because of the then existing and subsisting fiduciary relation, it was a gross breach of that relation for these defendants to "secrete and purloin" said books and papers and to enter into a conspiracy to cheat and defraud these plaintiffs out of their title to the said "Johnson Group" by means of the said fictitious and fraudulent suit, and said unjust and unconscionable judgment. There was no real defense made in the "old suit," owing to the fraudulent conspiracy of these directors, Endicott, Hackett and Fairchild and their agents and representatives, against these plaintiffs, T. S. and W. E. Nowell, stockholders of the said Berners Bay Company, and the relief asked for in this bill should be granted upon the authority of the case of *Pacific R.R. of Mo. v. Mo. Pac. Ry.* (*supra*).

Directors and officers of a company have no right to enter into a combination to obtain for themselves the property of the company at a sacrifice and secure for themselves a profit at the expense of the company.

Jackson v. Ludeling, 21 Wall. 616.

The directors should not, on the other hand, be permitted to enter into a combination to cheat one of the Company's stockholders out of his property for the benefit of themselves. If they owe the Company a duty not to cheat it out of its property for themselves, conversely, they owe a stockholder a duty not to abuse *their fiduciary position and relation* to cheat him out of his own personal property for the benefit of themselves, as was done in the "old suit." It was a clear breach of a fiduciary duty for these directors, Endicott, Hackett and Fairchild (*Tr.* p. 95), to enter into a combination, and by reason of their means of access to T. S. Nowell's books and papers, which access they had owing to this fiduciary relation and confidence reposed in them by T. S. Nowell (*Tr.* p. 115), to "secrete and purloin" his books and papers for the purpose of preventing him from making a defense against the fraudulent suit they brought against him (*Tr.* p. 150), by which they designed to cheat him out of his property (*Tr.* p. 151) for the benefit of themselves alone, to the exclusion of all the other stockholders and creditors of the said Berners Bay Company (*Tr.* p. 99). In this connection it is to be noticed that while the "old suit" was brought ostensibly for the benefit of the said Company, and that while Henry Endicott intervened therein as a stockholder, the suit was not brought in good faith for that purpose, but was brought at a time

when the Company was hopelessly insolvent (*Tr.* pp. 26, 95, 99, 174, 175), and when a decree in favor of the Company could be of no possible benefit to the Company's stockholders and unsecured creditors, and could accrue only to the benefit of the bondholders, of which bonds the Endicotts had a large number. (*Tr.* p. 178.) The "old suit" was a mere cloak to cover up the real design of the said conspirators. The grossly fraudulent character of the "old suit" is aggravated by the fact that these defendants through Hackett, in whom T. S. Nowell had had the utmost confidence and who was his co-director for years (*Tr.* p. 95), had free and unobstructed access to T. S. Nowell's private books (*Tr.* p. 115), which confidence and trust was treacherously abused on the part of Hackett by the wrongful carrying away and secreting of the same (*Tr.* pp. 143, 150, 114-118) in order to enable the said conspirators to cheat and defraud their trusting associate out of his property and good name. (*Tr.* pp. 151, 152.) The whole proceeding in the "old suit" is tainted with the grossest kind of fraud, moral turpitude and treachery on the part of these defendants-appellees. Hackett had free and unobstructed access to T. S. Nowell's private books and papers. (*Tr.* p. 115.) Hackett and his co-conspirators were enabled to carry away and secrete these said books and papers of T. S. Nowell wholly owing to this free and unobstructed access to the same. Is it supposable that if the books and papers had contained proofs of his guilt of the fraud charged against him that T. S. Nowell would have allowed others to have such unrestricted access to them? Men who do wrong do not act in that way. If these books contain evidence of the fraud charged against T. S. Nowell why did not these defend-

ants-appellees produce them in court at the trial of the "old suit" in accordance with the notice to produce? (*Tr.* p. 148.) Why did they conceal them for years and go to the length of defying the order of court of June 20, 1910, commanding them to produce the books they had so carried away and secreted? (*Tr.* p. 117.) These books and papers prove the iniquity of the "old suit" and proclaim the innocence of these plaintiffs-appellants. *That is the reason why these defendants* went to such desperate extremes in their efforts to keep these books and papers from these plaintiffs-appellants. These defendants-appellees are spoliators of evidence and the presumption of law is against them. Not only the presumption but the proofs are against them, for the evidence they secreted and suppressed contains the proofs of the fraudulent scheme and conspiracy of these defendants and it contains the proofs of the innocence of these plaintiffs Nowell. Therefore we have presumption of law and evidence united in establishing the fraud and conspiracy of these defendants-appellees. We submit that a court of equity cannot fail to rectify the great wrong that has been done these plaintiffs by these defendants. Otherwise parties who came into equity with unclean hands will be permitted to profit by their own wrong. Such a proposition is unthinkable.

When these defendants came into court as complainants in the "old suit" and purloined and secreted these books and papers, which they are claiming are the books of the Berners Bay Company (*Tr.* p. 148), and entered into a conspiracy to defraud these plaintiffs out of their title to the "Johnson Group" by means of an unjust decree (*Tr.* p. 151), they did these fraudulent acts in violation of the *uberrima fides* which they owed

to these plaintiffs by reason of the fiduciary relation that existed between defendants H. Endicott, Hackett and Fairchild, and these plaintiffs T. S. and W. E. Nowell. This alone should be sufficient to condemn these defendants and move a court of equity to deprive them of the ill-gotten profits of the iniquitous judgment which they so fraudulently procured.

IV.

THE DOCTRINE OF *RES JUDICATA* DOES NOT APPLY TO THE CASE AT BAR.

This is a bill in equity to set aside a decree for fraud in the obtaining thereof. It constitutes an original and independent proceeding for equitable relief; to vacate a decree alleged to have been obtained by fraud. It is the investigation of a new case arising upon new facts, although having relation to the validity of an actual judgment or decree or of the party's right to claim any benefit by reason thereof. *Barrow v. Hunton*, 99 U. S. 83, citing *Gaines v. Fuentes*, 92 U. S. 10.

The proceedings are tantamount to a bill in equity to set aside a decree for fraud in the obtaining thereof, and they constitute an original and independent proceeding. *Marshall v. Holmes*, 141 U. S. 597, citing *Gaines v. Fuentes*, 92 U. S. 10.

A new suit will be sustained to set aside and annul a former judgment or decree where, by reason of something done by the successful party to a suit, the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practised on him by his

opponent whereby there has never been a real contest in the trial or hearing of the case.

U. S. v. Throckmorton, 98 U. S. 65, 66.

The question of *res judicata* as applied to suits to set aside judgments or decrees for fraud is very fully gone into in the case of *National Surety Co. v. State Bank of Humboldt*, 120 Fed. 593, to which case reference is hereby made. The case of *Horton v. Stegmyer*, 175 Fed. 756, 758, briefly states the rule laid down in the case last cited as follows:

“Pleading and proof of facts dehors the record in that case, which evidence the alleged fraud upon the court or that upon the complainant, are indispensable to the vacation or disregard of that decree by this or any court.”

“A federal court sitting in equity has jurisdiction to disregard or to enjoin the enforcement of an unconscionable judgment of a state or of a national court for new causes, such as fraud, accident, or mistake, which deceive the court into a wrong decree or which prevent the judgment defendant from availing himself of a meritorious defense that was not fairly presented to the court which rendered the judgment. But it has no power to take such action on account of errors or irregularities in the proceedings on which the judgment or decree is founded, or on account of erroneous or illegal decisions by the court which rendered the judgment or decree. The reason of this rule is that cases of the former class present new controversies, which have never been raised in other courts, while cases of the latter class invoke a jurisdiction which does not exist, a jurisdiction in a federal court to review and revise the acts and decisions of

courts of co-ordinate jurisdiction upon questions which they have lawfully considered and adjudged. *National Surety Company v. State Bank of Humboldt*, 56 C. C. A. 657, 662, 664; 120 Fed. 593, 598, 600; 61 L. R. A. 394, and cases there cited. The decree of the state court is therefore valid, and it must be enforced and respected, unless the complainant has pleaded facts evidencing such a fraud as will warrant a disregard of it."

In *Kingsbury v. Buckner*, 134 U. S. 670, Mr. Justice Harlan, speaking for the court, stated that the Supreme Court of the United States had, in *Pacific Railroad of Mo. v. Ketchum*, 101 U. S. 289, 296, and in *Pacific Railroad of Missouri v. Missouri Pac. R. Co.*, 111 U. S. 505, 519, recognized the right as existing, by original bill, to impeach a decree for fraud, even after the decree has been affirmed by an appellate court.

The fact of being a party to a judgment or decree does not estop a person from obtaining, in a court of equity, relief against fraud in obtaining it. *Johnson v. Waters*, 111 U. S. 640, 667, 668.

A bill to impeach a decree for fraud is new and independent litigation; it is not a continuation of the original litigation.

Dowagiac Mfg. Co. v. M'Sherry Mfg. Co., 155 Fed. 524, 528.

De Chambrun v. Schermerhorn, 59 Fed. 504, was a suit to establish and enforce a trust. The question was whether the suit involved the principle of *res judicata*. At page 508, the Court said:

"It is not pretended that the question whether or not a secret oral trust existed was presented

to the state courts. Such a question was not incident to or essentially connected with the subject-matter of the litigation in the state courts, and it did not come within the legitimate purview of these actions. * * * The very nature of the question precluded it from being discussed in those actions. * * * Although it is possible that the question of trust might, if properly pleaded, have been litigated in the state courts, the fact that it was neither pleaded nor litigated is sufficient to prevent the application of the doctrine of *res judicata* within the rule of the federal courts." Citing *Cromwell v. Sac*, 94 U. S. 351.

The fraud alleged in this present bill was not incident to or essentially connected with the subject-matter of the litigation in the "old suit." The very nature of this question of fraud precluded it from being discussed in the "old suit." The fact that the fraud alleged in this bill was neither pleaded nor litigated in the "old suit" is sufficient to prevent the application of the doctrine of *res judicata*, within the rule of the federal courts.

As a matter of law the trial court in the "old suit" had no power to decide the question of fraud raised in the case at bar. This fraud was not pleaded, touched upon in the evidence, argued by counsel, or in any way decided in the "old suit." Had the trial court decided in the "old suit" that there was no fraud in the procurement of that decree such a decree or finding would not have been responsive to the issues tendered by the pleadings and would have been void for that reason.

Reynolds v. Stockton, 140 U. S. 270, 271.

Gille v. Emmons, 48 Pac. 569.

“A bill in equity constitutes an original and independent proceeding when it calls for the investigation of a new case, arising upon new facts, although it may have relation to the validity of an existing judgment or decree, and of the complainant’s rights to claim any benefit by reason thereof, or to be relieved therefrom, as the case may be. In such cases it is now well settled that courts of equity have the unquestioned power to give relief against judgments or decrees which were obtained by fraud, notwithstanding the fact that the suit, as instituted, has relation to frauds alleged to have been committed in a former suit in courts of another jurisdiction, state or national.”

Ralston v. Sharon, 51 Fed. 707, citing cases.

The case of *Rose v. Hawley*, 133 N. Y. 315, 320, holds that a former judgment is not a bar to a suit setting up a cause of action accruing after the former judgment, founded upon a subsequent occurrence, and finding for its support new and different evidence. The two causes of action are not and cannot be identical, for one never in fact existed, and the other has since come into being.

The cause of action in the case at bar accrued after the former judgment. These plaintiffs had no knowledge of the fraudulent “secreting and purloining” of the said books and papers until the year 1907 (*Tr.* p. 195), and not until September, 1910, did they have full and complete knowledge of the conspiracy and fraud that is alleged in this present bill. (*Tr.* pp. 118, 197.)

“A suit in equity to set aside a judgment in no sense assails the court in which the judgment was rendered.

It is simply a proceeding *in personam*, and the decree adjudges the rights of the parties *inter sese* in relation to that judgment."

Wonderly v. Lafayette County, 51 S. W. 745, 750, citing cases.

In *Hart v. Bates*, 17 So. Ca. 35, 43, 44, it was held that a judgment is not conclusive of a matter of fraud, when the question of fraud was not raised or decided in the former suit and the facts constituting the fraud were not known to the party injuriously affected.

This is an original, independent suit for equitable relief between the parties, although involving rights arising under judicial proceedings; such relief being grounded upon a new state of facts, disclosing not only imposition upon a court of justice but actual fraud in the procuring of a judgment. This case is within the equity jurisdiction of the District Court, as defined by the laws of the United States, and that court may, by its decree, lay hold of the parties, and compel them to do what according to the principles of equity they ought to do, thereby securing and establishing the rights of which the plaintiff is alleged to have been deprived by fraud and collusion.

Arrowsmith v. Gleason, 129 U. S. 100, 101.

For further authorities on this point, see:

Nesbitt v. Riverside Independent District, 144 U. S. 610, 620.

North Illinois Coal & Iron Co. v. Young, 12 Fed. 809.

Hendryx v. Perkins, 114 Fed. 801, 807.

Flood v. Templeton, 92 Pac. 78, 81, 82, citing Throckmorton case.

Sanford v. White, 132 Fed. 531, 535.

Freeman on Judgments (4th Ed.), Sec. 100 at p. 141.

See *Truman v. Carville Mfg. Co.*, 87 Fed. 470, decided by this Court of Appeals.

An examination of all the pleadings in the "old suit" will disclose that the pleas in this present bill, of fraud in bringing the "old suit," concealment of evidence, deceiving the court, etc., were never raised in the "old suit." It does not appear from the record that these points in controversy in this "new suit" were ever raised and necessarily decided by the court in the "old suit." There is no "extrinsic" evidence or proof that shows that these points were in fact decided by the court in the "old suit." That they must appear in relying upon a former judgment has been frequently decided by the United States Supreme Court. See *Steam Packet Co. v. Sickles*, 24 How. 333, 5 Wall. 580; *Miles v. Caldwell*, 2 Wall. 35, and cases therein cited. There is nothing to show that the plea in this "new suit" of fraud in the procurement of the decree in the "old suit" was ever raised and put in issue and decided by the court in that suit. Nor is there any pleading under which it might have been decided. The allegation in this "new suit" of fraud in the procurement of the decree in the "old suit" is a distinct and substantial defense to the charges of fraud in the "old suit," sufficient to defeat the action, which allegation was never before presented to the court in the "old suit," and, therefore, never decided. Wherefore, these plaintiffs' right to have this fraud inquired into in this action is not concluded by the former suit. To give these plaintiffs no opportunity to show that the former decree was an untrue decree and procured by conspiracy and deceit, or to have the benefit of evidence subsequently discovered which will prove this said conspiracy and

deceit, will result in shutting out the truth where authority does not demand, justice clearly forbids, and expediency does not warrant.

The foregoing principles and authorities fully establish the right of these plaintiffs to invoke equitable jurisdiction to set aside the decree in the former suit for fraud in obtaining the same.

What is the difference between the "old suit" and this "new suit"? Briefly stated the difference is this:

In the "old suit" these plaintiffs were charged with fraudulently altering and changing the corporate records to cheat the Berners Bay Company out of the title to the "Johnson Group." (*Tr.* p. 16.)

In this "new suit" these defendants, the complainants in the "old suit," are charged with having obtained the decree in the "old suit" by means of a conspiracy to prevent these plaintiffs from presenting their defense to said charges of fraud. (*Tr.* p. 183.)

In the "old suit" these plaintiffs were charged with a fraud. In this "new suit" these *defendants* are charged with a fraud.

The question in the "old suit" was: did the Nowells fraudulently alter and change the records of the Berners Bay Company?

The question in this "new suit" is: did these defendants by means of their fraudulent conspiracy prevent the defense of the Nowells in the "old suit"?

Where is the similarity between the two cases? There is none. The question of the fraud alleged in this present suit was not raised in the "old suit." These plaintiffs are the only persons or parties who could have raised the issue presented in this present appeal. At the time of the trial of the "old suit" these plaintiffs

had not the slightest knowledge of the fraudulent conspiracy alleged in this "new suit." (*Tr.* pp. 136, 137.) Therefore, it was not in issue in the "old suit," was not pleaded, argued, or decided in the "old suit." If it was not adjudicated in the "old suit" how can it be said to be *res judicata* in this "new suit"? This case "is the investigation of a case arising upon new facts." The "new facts" are those constituting the conspiracy to prevent the defense of the Nowells in the "old suit." This "new suit" constitutes an "original and independent proceeding," although the new facts "have relation to the validity of an actual judgment or decree." This "new suit" "presents a new controversy," viz., that of the fraudulent conspiracy of these defendants to procure the unjust decree in the "old suit." We are not contending that the decree of the court in the "old suit" was erroneous or irregular. We *are* contending that the court in that "old suit" was deceived into making an unconscionable decree by means of the fraudulent preventing of the defense of these plaintiffs. There is a vast difference between contending that a court made a wrong decision because it was mistaken in its weighing of the evidence or in its application of the law to the facts, and contending that the extrinsic and collateral fraud and conspiracy of the plaintiffs in the "old suit" prevented these plaintiffs from availing themselves of their meritorious defense that was not fairly presented to the court which rendered the judgment. In the former case an aggrieved party has his appeal to a higher court to correct the erroneous judgment of the trial court. In the latter case an appeal would not help the victim of the conspiracy. His only course is to bring a bill in equity in the trial court

to have the unjust decree set aside for fraud in its procurement. The conspiracy and fraud alleged in this "new suit" have been admitted by the demurrer. How else can this admitted wrong be redressed in this case except by means of an independent suit to set aside the fraudulent decree? The two cases are diametrically opposed to one another. In one case a decree was obtained for a fraudulent alteration of a corporate record. In the other case the plaintiffs urge that that decree was obtained by means of a conspiracy to prevent a meritorious defense. If the allegations in the second case are true the first decree should not be allowed to stand; it is a miscarriage of justice, a judicial monstrosity. The decision of the second case depends upon an entirely new set of facts and proofs: did the complainants in the first case commit the fraudulent acts whereby the decree in the "old suit" was fraudulently obtained? That is a new question. If answered in the affirmative the decree in the "old suit" must cease to exist as a judicial decision. The court decided in the "old case" that the Nowells committed the fraud alleged. In this case the plaintiffs are alleging that that decision was the result of a conspiracy which prevented the court from learning the truth. There has been no adjudication of the facts constituting the conspiracy alleged in this bill in any case or judicial proceeding whatsoever. Until these new facts alleged in this bill have been passed upon by a court there has been no adjudication upon the issues raised herein. And until there has been an adjudication based upon the law applied to the new facts alleged in this bill, the matters therein alleged are not *res judicata*. And that is all there is to it. Further argument would be a waste of time.

V.

IT WAS A FRAUD FOR WHICH EQUITY WILL
GIVE RELIEF FALSELY TO ALLEGE FRAUD
WITH THE INTENT TO DECEIVE THE
TRIAL COURT INTO TAKING JURISDIC-
TION OF THE "OLD SUIT."

These defendants at the time they brought the "old suit" had slept on their pretended rights for ten years,—from 1896 to 1906, and the only way in which they could induce the trial court to take jurisdiction of the "old suit" was to overcome the legal effect of their ten years of delay by alleging fraud (*Tr.* p. 173), for the case without an allegation of fraud should have been dismissed for want of equity. See *Moore v. Nickey*, 133 Fed. 289, decided by this court, the facts being almost identical in the two cases except for the allegation of fraud. Therefore, in order to get into court, these defendants had to allege fraud, which they did, well knowing that such allegation was false and without the slightest foundation in law or fact. (*Tr.* pp. 173, 183.) This was a fraud upon the court for which the decree in the "old suit" should be set aside and annulled.

In *Parsons v. Weis*, 144 Cal. at 419, it is said:

"The allegations in a complaint may be erroneous as matter of law, or they may be untrue in point of fact, and yet be made in good faith and in the belief that they are true, but if they are made with the knowledge on the part of the party making them that they are false, a judgment rendered thereon is fraudulently obtained, and should be set aside and annulled."

In *Fitzpatrick v. Stevens*, 89 S. W. 897, a holder of a paid note filed it against the maker's estate and filed a false affidavit that it was due. The administrator did not know that the note had been paid, and later filed a suit to vacate the judgment allowing it against the estate. Held for plaintiff. At p. 899:

"That the instrument which set the court in motion involved none but intrinsic facts made it none the less a fraudulent device, without which the court could not have acted. Through it the proceedings reached the hand of the court tainted with fraud. To thrust a thing so corrupt in its inception into court was a fraud upon the administration of justice, and no judicial act innocently performed for its effectuation could serve to purge it of corruption. The case, therefore, possesses all of the elements for equitable action." (Citing *U. S. v. Throckmorton*, 98 U. S. 61, amongst other cases.)

"The party against whom it is sought to assert the judgment on injunction may avoid its effect by showing that it was obtained by reason of the fact that the opposite party fraudulently misrepresented the facts to the judge." (Head-note No. 2.) At p. 256: "In the present case the evidence for the plaintiffs is sufficient to support the conclusion that there was no reason why the Gress Manufacturing Company should have sought an injunction against them, *unless some ulterior object* was in view by means of which it hoped to gain an unfair advantage over them." At p. 257: "And in any case where it can be shown that the prior judgment was fraudulently obtained,

either because the plaintiff in the antecedent case did not make a fair representation of the facts of his case, or because the finding therein was induced or procured by perjury, the effect of the judgment in his favor is invalidated. In this case there is evidence which would authorize the jury to infer that the statements contained in the petition for injunction and verified by an officer of the Gress Manufacturing Company, as well as testimony offered in behalf of the injunction at the hearing, were not only false, but known to be false by the witness and by the petitioners. If the jury so found, the prior judgment would afford no protection to the defendants in the present action in rebutting a lack of probable cause, but, on the contrary, would show that the proceeding for injunction was instituted and carried on without probable cause. For this reason we think the court erred in awarding a non-suit. If the jury were satisfied, from the evidence, that the judge would not have granted the injunction but for the fraudulent representations on the part of the Gress Manufacturing Company, and that that judgment was induced by the perjury, upon this branch of the case the plaintiffs in the present action would be entitled to recover." (Italics ours.)

Lockett & Williams v. Gress Mfg. Co., 70 S. E. 255.

In *Graver v. Faurot*, 76 Fed. 257 (*supra*), the answer was false and the complainants were at the mercy of their adversaries and had to accept or yield to their suppression of the truth, since they were in possession of no evidence with which to refute the allegations of the answer although complainants were certain that the answer was false. The case cited holds at p. 261 that

the false answer was, under the circumstances, "positive and actual fraud" both upon the complainant and upon the court. If so, under the circumstances existing in this present case the false bill of complaint and petition of intervention in the "old suit" were also a "positive and actual fraud" upon these plaintiffs and the court. These plaintiffs were at the mercy of their adversaries in the "old suit," and had to yield or accept their suppression of the truth, since these plaintiffs had no evidence with which to refute the allegations of fraud in the "old suit." (*Tr.* pp. 139, 145, 132.) These defendants had "purloined and secreted" all that evidence. (*Tr.* pp. 132, 133.)

In *Davis v. Albritton*, 119 Am. St. Rep. 352, false allegations of the residence of deceased to secure jurisdiction were held a fraud upon the court.

In *Cowan v. Brett*, 97 S. W. 330, it was held that where false statements were made to the court by plaintiffs and their agent as to the ownership of land, whereby the court was induced to enter a decree which would not have been entered but for such representations, and which representations were false, such representations constitute a fraud and justified a decree setting aside the judgment.

These defendants wilfully concealed from the court that their claim was an unjust one (*Tr.* p. 183), and filed false pleadings alleging fraud in order to get into court (*Tr.* p. 173), purloined and suppressed material evidence and the truth, with intent to deceive and mislead the court (*Tr.* p. 151), which acts bring this case within the rule announced in *Wickersham v. Comerford*, 96 Cal. 433, 439, 440.

See *Freem. on Judgm.* (4th Ed.) Secs. 489, 491.

In *Miller v. Higgins*, 111 Pac. 403, facts affecting the jurisdiction of the court were concealed from it. *Held*, p. 406, ground for relief in equity and decree set aside. But for the said concealment the court would not have made the decree in the first instance.

So in this case, but for the concealment the decree would not have been made in the "old suit." (*Tr.* pp. 150, 151, 210, 211.)

Dunlap v. Steere, 92 Cal. 344, holds that filing a false affidavit containing a false statement of a cause of action known to be false, and a false complaint, and obtaining an unconscionable judgment against an absent defendant, is a fraud upon the court and defendant, and the judgment should be set aside. Such an affidavit is filed for the purpose of obtaining an order for service of summons by publication, and it was held to be a fraud upon the court. (Citing *Throckmorton* case.)

What difference, we would ask, is there between the filing of such an affidavit known to be false and the filing of a false bill of complaint also known to be false, to secure jurisdiction? The affidavit is *ex parte*, to be sure, but so is a false bill of complaint filed simply to get into court. The difference between the two results from a fair trial on the merits on the issues raised. In the "old suit" the false allegations of fraud were made to get into court, and then all opportunity to defend was prevented by these defendants who filed the false bill of complaint in the "old suit." On the authority of *Dunlap v. Steere* this was a fraud upon the jurisdiction of the court. The acts done to prevent the Nowells from presenting their meritorious defense in the "old suit" were equivalent to bringing a suit without the knowledge of defendant.

Parsons v. Weis, 144 Cal. 410, holds that to file a wilfully false complaint in the absence of defendant and procure an unjust judgment against him, to which he had a meritorious defense, is a fraud, and such fraudulent judgment should be set aside and annulled.

The preventing of the defense by secreting evidence is equivalent to keeping a party in ignorance of the proceedings, for the result is the same, no defense is made, and the principles applying to cases where the defendant was physically kept away from court apply with equal force to the case, as here, where the defense was prevented by the secreting of the evidence constituting that defense.

The circumstances and facts of this case bring it within the rule of *Dunlap v. Steere*, for the above reason, that the filing of a false bill of complaint, coupled with the preventing of the defense of these defendants in the "old suit," by the "purloining and secreting" of their evidence, was the equivalent of filing a false complaint against an absent defendant. The filing of the false complaint was done to secure the jurisdiction of the court (*Tr.* p. 173), and it was a fraud upon the court within the rule of *Dunlap v. Steere* and *Parsons v. Weis*, *supra*.

VI.

THERE WAS AN ABSOLUTE WANT OF JURISDICTION TO HEAR AND DETERMINE THE "OLD SUIT."

A void judgment is a mere nullity and may be impeached in any action, direct or collateral.

Radil v. Sawyer, 122 N. W. 980, 981.

“A question of jurisdiction is fundamental and underlies all other questions arising in the course of a litigation. Such a question may be raised at any time, in any mode, and at every stage, as every step taken in the progress of a cause is an assertion of jurisdiction, and the court may, of its own motion, make the objection or institute such investigation as may be necessary to establish or defeat it. This is especially true of the federal courts, as being courts of limited or statutory jurisdiction.”

Kreider v. Cole, 149 Fed. 649.

The “old suit” was brought by F. D. Nowell, receiver, and W. B. Hoggatt, co-receiver, as receivers of the property of the Berners Bay Mining and Milling Company. (*Tr.* p. 4.) The District Court at Juneau, Alaska, decided that the appointment of F. D. Nowell, on February 12, 1898 (*Tr.* pp. 95, 96), as such receiver was void for want of jurisdiction, since there was no pending cause of action at the time he was appointed. (*Tr.* p. 203.) This Court of Appeals affirmed that decision (169 Fed. 497). (*Tr.* p. 203.) Therefore, in January, 1906, there was no legal receiver to institute the “old suit”; the “old suit” was instituted by a fictitious party, a party who had no legal existence or entity.

After the termination of a receivership a receiver may not maintain an action, although there was no formal order of court discharging him.

Henderson v. Pilley, 32 So. 490, 491.

W. B. Hoggatt, on January 3, 1906, was appointed co-receiver to manage the "old suit." (*Tr.* pp. 112, 113.)

If there was no receiver, and the receivership since February 12, 1898, was void, then there could not be such a thing as a co-receiver. A co-receiver cannot be engrafted upon a void receivership. A void receivership does not exist in legal contemplation.

F. D. Nowell stood in no representative character to the Berners Bay Company, and his duties were limited to those of a subordinate employee, a mere local agent. (*Tr.* p. 189.)

St. Clair v. Cox, 106 U. S. 359, 360.

An agent cannot sue in equity in his own name for the benefit of the corporation. The bill must be prosecuted in the name of the real party in interest.

Oakey v. Bend, 3 Edw. Ch. (N. Y.) 482.

Jones v. Hart's Ex'rs, 1 Hen. & M. 470 (Va.)

A suit in equity cannot be brought in the name of one party for the use or benefit of another. It not only may, but must be prosecuted in the name of the real party in interest.

16 Cyc. 197, and cases cited.

An action cannot be maintained in the name of a mere agent of a corporation.

Gilmore v. Pope, 5 Mass. 491, 493.

"The power of control is the test of the liability of a principal for the negligence of

his alleged agent. If the principal cannot control and direct him in the discharge of a given duty, then he is not his agent in its performance and the alleged principal is neither chargeable with nor liable for his negligence in its discharge."

National Surety Co. v. State Bank, 120 Fed. 597, citing cases.

The co-receiver, W. B. Hoggatt, was not the agent of the Berners Bay Company. The Company had no control over him and could not direct him in the management of the "old suit," therefore he cannot be held to be the agent of the Company in any event or for any purpose whatsoever.

An action on a contract either express or implied must be brought in the name of the party in whom the legal interest is vested. An agent cannot sue in his own name where the legal interest is vested in his principal.

9 Cyc. 702.

31 Cyc. 1618.

Phillips v. Henshaw, 5 Cal. 509.

Fay v. Walsh, 77 N. E. 44.

Neely v. Robinson, 17 Fed. Cas. No. 10,082a, and note.

Gunn v. Cantine, 10 Johns. 387.

Neither F. D. Nowell nor W. B. Hoggatt had any interest whatever in the Berners Bay Company, or in the result of the "old suit." (*Tr.* p. 204.)

Parties prosecuting a title must connect themselves in some way with it, so as to show some real interest to be protected. A mere stranger to a title cannot do so.

McMicken v. U. S., 97 U. S. 204, 208.

The receivers were strangers to the alleged equitable title of the Berners Bay Company. They had no interest of any kind in the result of the suit. (*Tr.* p. 204.)

F. D. Nowell had no title in or to the property of the Berners Bay Company. He had no title as receiver, since the receivership was void, and he had no title, either legal or equitable, as agent. He was not a stockholder or bondholder of the Company. He was a mere stranger to the suit. He had no right of action or power to sue. This objection is not waived by a failure to demur.


30 Cyc. 31, and cases cited.

F. D. Nowell not having the remedial interest the judgment cannot be claimed, even after a contest on the merits.

Lytle v. Lytle, 2 Metc. (Ky.) 127, 129.

Weidner v. Rankin, 26 Ohio St. 522, 525.

And if there had been a trial with a verdict and judgment for plaintiff the case may still be dismissed by the reviewing court.

 30 Cyc. 32, citing *Weidner v. Rankin*, 26 Ohio St. 522.

In equity the claimant must be clothed with a title which the court could recognize.

Carter v. Carter, 82 Va. 632, citing 1 Danl.

Chy. Pr. 314; 1 Barton's Chy. Pr. 349, 350.

There was no title of any kind, either legal or beneficial, in F. D. Nowell or W. B. Hoggatt as such illegal receivers, and none in F. D. Nowell as agent or individual.

A corporation must sue in its own name.

3 Cook on Corporations (6th Ed.) Sec., 751, at p. 2516.

The "old suit" was not brought in the name of the corporation, the Berners Bay Company, but was brought in the names of F. D. Nowell, receiver, and W. B. Hoggatt, co-receiver, as receivers of the property of said Berners Bay Company. (*Tr.* p. 4.)

No benefit can result to W. B. Hoggatt and John C. McBride from a suit by F. D. Nowell as receiver under an unlawful appointment, and the court had no jurisdiction to permit the continuance of such suit, as the annulment of the appointment, or void appointment, of F. D. Nowell as receiver put an end to the power and authority to prosecute the suit.

Hubert v. City of New Orleans, 130 Fed. 21.

Even if the appointment of John C. McBride on September 27, 1906 (eight months after the bringing of the "old suit") was a valid appointment it cannot avail these defendants, for the simple reason that a party cannot bring his case within the jurisdiction of a federal court merely because at some time in the proceedings the interests and circumstances of the parties may so adjust themselves that the court would have jurisdiction if the suit were brought anew.

Adams v. City of Woburn, 174 Fed. 192, 193.

Jurisdiction must exist at the time of the commencement of the suit.

Koenisburger v. Richmond Silver Min. Co., 158 U. S. 49, 50.

Lack of indispensable parties goes absolutely to the jurisdiction of the court.

Goodman v. Niblack, 12 Otto, 556.
Gregory v. Stetson, 133 U. S. 579.

The only decree which the absence of indispensable parties to a suit will sustain is one which dismisses the bill upon that ground without prejudice to another suit against the same defendants and all other indispensable parties upon the same cause of action. The absence of indispensable parties is fatal to the jurisdiction of the federal courts.

O'Neil v. Walcott Min. Co., 174 Fed. 528, 535 536.

A court is without jurisdiction and must dismiss the bill where parties interested are not before it, and the appellate court cannot take jurisdiction for the same reason.

Coy v. Mason, 17 How. 580, 583.

A judgment void for want of jurisdiction over defendant's person may be vacated irrespective of the lapse of time.

Lushington v. Seattle Auto, etc., Club, 111 Pac. 785, 786.

A void judgment is void for any purpose and can be directly attacked at any time when the party holding seeks to derive some advantage therefrom, and no affidavit of a meritorious defense is necessary.

Stubbs v. McGillis, 96 Pac. 1005, 1007.

Where a court is without jurisdiction it is in general irregular to make any order in the cause except to dismiss the suit, but the court may set aside such orders as had been improperly made before the want of jurisdiction is discovered.

Mail Co. v. Flanders, 12 Wall. 130.

The District Court had no jurisdiction to try the "old suit" for want of an indispensable party, the Berners Bay Mining and Milling Company.

Kendig v. Dean, 97 U. S. 423.

Corporations themselves are indispensable parties to a bill which affects their corporate rights or liabilities.

Swan Land & Cattle Co. v. Frank, 148 U. S. 603.

Suits in equity cannot be entertained and decree be rendered, when necessary or indispensable parties, whether corporations or individuals, are not brought before the court.

Swan Land & Cattle Co. v. Frank, 148 U. S. 603, 611.

If an action is brought in the name of that which under the *lex fori* has no legal entity, it is as if there was no plaintiff in the record, and therefore no action before the court.

30 Cyc. 27, and cases. Also pp. 30, 31, 32.

There were no such persons as F. D. Nowell and W. B. Hoggatt, receivers; they did not exist as legal entities. There were no such persons in *rerum natura* to maintain the action.

Porter v. Cresson, 10 Serg. & R. (Pa.) 257, 258.

The mention of the Company's name as the party for whose use the suit was brought did not make the Company, either substantially or formally, a party to the action.

Lytle v. Lytle, 2 Metc. (Ky.) 128.

Carey v. Roosevelt, 81 Fed. 608, holds that a judgment binding against administrators is not binding on them as legatees merely because of their personal identity.

Therefore, a suit by a receiver would not be binding on F. D. Nowell as agent, even if he had had a right of action as agent.

Where parties indispensable to a decree for specific performance are not before the court, the bill must be dismissed.

Shields v. Barrow, 17 How. 130.

Specific performance will not be decreed, unless all the necessary parties are before the court.

Riggs Land Co. v. Motley, 124 N. W. 438.

The "old suit" was for specific performance.

The objection as to indispensable parties may be taken at any time, on the hearing, or on an appeal.

Coiron v. Millaudon, 19 How. 113, 115.

Alexander v. Horner, 1 Fed. Cas. No. 169, p. 370.

Baker v. Biddle, 2 Fed. Cas. 764 (Head-note No. 6).

Granquist v. Watson Tube Co., 88 N. E. 468, 471.

16 Cyc. 205.

The objection to indispensable parties contended for herein was not definitely settled until this court had, in April, 1909, affirmed the decree of the lower court in the case of *Nowell v. International Trust Co.*, 169 Fed. 497, and therefore could not have been taken before the institution of this present suit.

"Intervention is the admission, by leave of court, of a person not an original party to pending legal proceedings, by which such person becomes a party thereto for the pro-

tection of some right or interest alleged by him to be affected by such proceedings.”

17 Am. & Eng. Encyc. of Law (2d Ed.), 180.

Interveners must take the case as they find it.

Kenner's Syndic. v. Halliday, 19 La. (Curry), 98.

Cahn v. Ford, 8 So. 477.

“Unless a valid jurisdiction has been asserted in the original suit, no intervention therein can be entertained. The right to intervene must be predicated primarily on the existence of a suit of which the court has jurisdiction.”

Kreider v. Cole, 149 Fed. 647, 658.

The “old suit” was void in its inception. At the time Henry Endicott intervened in the “old suit” there was no suit pending, since the whole proceeding was void *ab initio* for want of indispensable parties. Intervention cannot be based upon a void proceeding, for a void proceeding is a nullity. The intervention of Henry Endicott was predicated on the existence of a suit when there was not any such suit. Intervention cannot be based upon nothing, therefore the intervention of Henry Endicott in the “old suit” must fall to the ground for want of an existent suit of which the court had jurisdiction.

“Sec. 14. An action shall be deemed commenced when the complaint is filed and the summons issued.”

Alaska Civil Code and Code of Civil Procedure, Title II, Ch. 2, Sec. 14.

The complaint and summons in the “old suit” were filed on January 18, 1906, therefore the suit must be “deemed commenced” on January 18, 1906.

Jurisdiction must exist at the time of the commencement of the suit.

Koenigsberger v. Richmond Silver Min. Co.,
158 U. S. 49, 50.

The "old suit" was commenced on January 18, 1906. (*Tr.* p. 3.) Jurisdiction of the "old suit" did not exist on January 18, 1906, for the reason that there was an entire lack of indispensable parties to the said "old suit." The Company did not bring the suit. It was brought by two persons, F. D. Nowell and W. B. Hoggatt as receivers (*Tr.* p. 4), who had no interest whatever in the Berners Bay Company (*Tr.* p. 204), who had no authority as individuals to bring said suit, who were not legal receivers of the property of the Berners Bay Company. (*Tr.* p. 204.) Therefore, the District Court was without jurisdiction to entertain the "old suit" when the "old suit" was commenced, and if jurisdiction did not exist at the commencement of the "old suit" no change in the relations of the parties at a later time can cure the lack of jurisdiction at the beginning of the proceedings. (See 174 Fed. 192, 193, *supra*.)

A personal judgment rendered without personal jurisdiction is a nullity.

Pennoyer v. Neff, 95 U. S. 714.

Hall v. Lanning, 91 U. S. 160.

To give any effect thereto is a denial of due process of law.

Pennoyer v. Neff, 95 U. S. 714.

Scott v. McNeal, 154 U. S. 34.

Harvard Law Review, Mch. 1912.

There was no personal jurisdiction over these plaintiffs in the "old suit," for the reason that there was an entire lack of indispensable parties to bring the "old

suit." It was brought by mere strangers who had not the slightest interest in the Berners Bay Company or in the result of the "old suit." It was a nullity from its very beginning.

"No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party."

Scott v. McNeal, 154 U. S. 46.

Even a judgment in proceedings strictly *in rem* is wholly void if a fact essential to the jurisdiction of the court did not exist.

Scott v. McNeal, 154 U. S. 46.

Even record recitals of jurisdictional facts do not preclude oral testimony as to the existence of those facts.

Cooper v. Newell, 173 U. S. 555, 566.

VII.

UPON DEMURRER TO THE BILL THE QUESTION OF LACHES CANNOT BE CONSIDERED.

The question of laches cannot be considered upon demurrer to the bill where the bill alleges that complainant was ignorant of the matters constituting the foundation of his right, and that, as soon as he discovered them, he took the necessary steps to assert his right. That is a question which more properly arises upon the final hearing of the case on its merits, to be finally

determined upon the proofs and the law applicable to the evidence.

Ulman v. Jaeger, 67 Fed. 980, 984.

The time during which the appeal of the former suit was pending cannot be counted against the appellants.

Ensminger v. Powers, 108 U. S. 292, 302, 303.

“Plaintiff in his brief insists that the defendant has not shown due diligence in discovering the fraud. The answer avers that the fraud was known only to plaintiff and Owings and by them concealed, so that defendant did not discover it until after the institution of this suit. There could be no laches, on the part of defendant, under these circumstances.”

Wonderly v. Lafayette County, 51 S. W. 750.

In the great leading case of *Le Guen v. Gouverneur & Kemble*, 1 John. Cas. 494, Mr. Justice Radcliffe said:

“It is, however, admitted that cases in which there are no laches or neglect form exceptions to the rule. Thus where a party has no notice of a defense to which he is entitled, or can make it appear that material evidence has been subsequently discovered which would probably support that defense and alter the determination, he ought not to be concluded.”
“The charge of laches cannot justly be brought against one for omitting to assail a deed *for fraud*, when he had no knowledge of the facts constituting such fraud. To assail a deed for fraud without satisfactory evidence would be inexcusable. It cannot be necessary for every suitor to assail as fraudulent every deed

proved on the other side in every case in order to escape the penalty of being precluded from doing so at a future time, in case he should discover evidence that would justify such charge."

Hart v. Bates, 17 So. Car. 44.

The possession and concealment of these said books and papers by these defendants exonerates these plaintiffs from the charge of laches.

The Cairo & Fulton R. R. Co. v. Titus, 28 N. J. Eq. 269.

The charge of laches cannot justly be brought against these plaintiffs for omitting to assail the decree in the "old suit" for fraud, for at the time they had no knowledge of the facts constituting such fraud. (*Tr.* pp. 136, 137.)

We submit that the question of laches cannot be considered on demurrer. (See Sec. I of this brief.)

However, as defendants in paragraph VIII of their demurrer have urged that this action has not been commenced within the time limited by the Code of Alaska, we hereby show the Court that at the time of the trial of the "old suit" these plaintiffs had no knowledge of the conspiracy and fraud of these defendants alleged in this present bill. (*Tr.* pp. 136, 137.) That was in April, 1906. The decree of the trial court in the "old suit" was handed down in January, 1907. (*Tr.* p. 186.) The appeal of the "old suit" was heard in this court of appeals on May 27, 1907 (*Tr.* p. 186), which affirmed the decree of the trial court in June, 1908. (*Tr.* p. 186.) In November, 1908, this court denied the two petitions, one for rehearing and one relating to decree and mandate. (*Tr.* p. 189.) The mandate in the appeal of the "old suit" issued in December, 1908. (*Tr.* p. 189.) The fraud was dis-

covered on November 6, 1908. (*Tr.* p. 194.) This present suit was commenced on March 2, 1909. (*Tr.* p. 202.)

The appeal of the "old suit" was, it is to be seen, not finally disposed of until November 2, 1908, on which day this court denied the above-named petitions. (*Tr.* p. 189.) This suit was commenced four days less than four months from the date of discovery of the fraud, and exactly four months from the day the appeal of the "old suit" was finally disposed of (*Tr.* pp. 194, 202), and within the term of court in which the "old suit" got back, by reason of issuance of the mandate, in the trial court. The statute of limitations begins to run from the date of discovery of fraud. That principle is too well established to need citations. Furthermore, the United States Supreme Court has held that the time during which the appeal was pending cannot be counted against the appellants. (108 U. S. 292, 302, 303, *supra*.) We have conclusively shown that this bill is an independent proceeding, that it is not a continuance of the "old suit," and that equity has jurisdiction of such cases of fraud (*supra*). We know of no rule of law, judicial decision, or provision of the Alaska Code which requires that an independent proceeding in equity to vacate a decree for fraud, such as the present one, shall be commenced less than four months, or even four months, from the date of discovery of the fraud or final disposition of the original suit.

We submit that parties who delay for ten years to pursue their pretended rights, during which time the defendant reaches his seventy-fourth year, a material witness dies, and all recollection of the surrounding circumstances of the transactions in question have passed from the mind of the only living party thereto,

and which slothful parties, after all these years and events, "secrete and purloin" all the evidence of the defendant proving the transaction complained of to be entirely free from fraud or moral turpitude, we submit that such dilatory and fraudulent parties are not entitled to plead or argue that T. S. Nowell should be penalized for the legitimate and natural results of these defendants' own negligence, delay, fraud and conspiracy. It does not lie in the mouths of these slothful and fraudulent conspirators to claim or contend in a court of equity that innocent parties, such as these plaintiffs are, shall be held liable or punished for the conditions that have been brought about solely by the unreasonable delay and fraudulent conspiracy of these defendants and of these defendants alone. That would be permitting parties to profit by their own wrong with a vengeance. Furthermore, there has been no such delay in the discovery of the herein alleged fraud and conspiracy and in the prosecution of this present suit as would preclude these plaintiffs from seeking in equity to right the great wrong that has been done them.

VIII.

IN CONCLUSION.

This case cannot be fairly decided by taking any single fact or point into consideration. It must be decided by an application of established principles of equitable jurisdiction to all the facts.

These plaintiffs have come into equity with clean hands, they are guilty of no fault or wrong. They have, on the contrary, been grievously wronged by the conspiracy and wrongful acts of these defendants.

In brief, these wrongful acts consist of taking unfair advantage of the old age and defective memory of T. S. Nowell, which state of memory these defendants made possible by a delay of ten years. During these ten years the only witness available to these plaintiffs had died and the Nowells had been lulled by the acquiescence of these defendants into security in their title to the property in dispute, and had dismissed the transaction in issue wholly from their minds. These defendants, desiring to coerce the Nowells into joining them in their scheme, conspired to sue them, and as a preliminary precaution wrongfully carried away and secreted T. S. Nowell's books and papers and prevented him from using them in the "old suit" in defending himself against their conspiracy.

Defendant Hackett deceived the manager of the storage warehouse into believing that he would not molest or carry away any of T. S. Nowell's books, and concealed the wrongful carrying of the same by receipting for books of the Berners Bay Company only. Having thus gained control of these books, unbeknown to T. S. Nowell, they conspired to bring a suit against the Nowells, and in order to avoid the effect of their ten years of delay these defendants alleged fraud, which allegation of fraud they well knew to be utterly false. They framed the allegations of fraud in such vague, misleading terms that these defendants were entirely misled as to the issues they would be obliged to meet. They then took the deposition of T. S. Nowell as their own witness and thereby learned that he would be able to remember almost nothing of the particular transaction, and they also learned for a certainty that if they succeeded in their design to keep

the purloined books concealed T. S. Nowell would not be able to offer any defense against their allegations of fraud, in which concealment these defendants succeeded until long after the "old suit" was tried and decided.

Demand was made for the production of the books of the Company, but defendants utterly failed to produce them. They did not exhibit a single book or writing to T. S. Nowell during their said examination of him as a witness, and did not give him the slightest opportunity to refresh his memory or explain. They then took the perjured depositions of Henry and William Endicott, and to give plausibility to these false and perjured depositions they extracted from the files and papers of the said Company certain defective writings which had been superseded by other perfect and complete writings and which had been acted upon in lieu of the said defective writings, and they offered said defective writings in evidence as being the true and authentic writings concerning the transactions to which they had reference, and Henry Endicott attached them to his false deposition and testified as to their genuineness and verity.

The bill of complaint and petition of intervention filed in the "old suit" were so vague and misleading that as matter of fact these plaintiffs (defendants in the "old suit") did actually believe that it was the corporate records of the Berners Bay Company that they were charged with fraudulently altering, whereas it later developed that it was a mere rough draft of an offer in the handwriting of W. M. Payson that was the basis of this charge of fraudulently altering the corporate records of the Company. In the mean time all

the evidence of their conspiracy was in the hands of these defendants, who, after discovery, denied that they had T. S. Nowell's said books and papers, and who persisted in concealing them until forced to produce by an order of court. Therefore, any motion for a new trial would have been futile, as these plaintiffs were in possession of nothing upon which to base a motion for a new trial and knew of nothing at that time. These defendants had it all. In short, the defendants brought a fictitious suit and prevented T. S. Nowell from defending it.

By means of these artifices, contrivances and fraudulent acts these defendants succeeded in foisting upon the court a case which it would otherwise have dismissed *sua sponte*, and by skillfully and treacherously contriving to keep the truth from the knowledge of the court and these plaintiffs and by deceiving the court into believing that their false testimony was true, and by preventing T. S. Nowell from making an adequate and meritorious defense, and by preventing a fair submission of the issues and merits of the case, they deceived the court into making the untrue and unjust decree complained of in this "new suit."

The Circuit Court in the above-cited case of *U. S. v. Flint* has stated the specific extrinsic fraud alleged in this present bill, "the secreting and purloining of an adversary's testimony," as being a ground for equitable interposition, which case when taken with the affirmance of that case in 98 U. S. 61 (Throckmorton case) affords sufficient authority to reverse the decree of the lower court.

We respectfully submit that the facts alleged in this present bill bring it well within the principles laid

down in *U. S. v. Flint, supra*, and *U. S. v. Throckmorton, supra*, and other cases cited in this brief. But the right of these plaintiffs to have relief against the great wrong they have suffered does not rest alone on the "secreting and purloining" of their testimony, but as well upon the remainder of the conspiracy of these defendants to wrong these plaintiffs as evidenced by the various acts showing the intention on the part of these defendants to do the wrong herein alleged, which other acts consisted of the false pleadings, the vague and misleading allegations, the unfair advantage taken of T. S. Nowell, whom they called as their own witness, the production of false writings in evidence, the false testimony, the attack upon good names, the contemplated and intended cheating another out of his property, the outrage upon the court, which acts demonstrate the wickedness and depravity of this iniquitous scheme and foul conspiracy.

The salient facts to be remembered in the consideration of this cause are:

1. That these plaintiffs have suffered a great judicial wrong.

2. That this great judicial wrong has been called into existence and brought about by the conspiracy, fraud, secreting and purloining of evidence, and perjury and deception which these defendants practised upon the trial court and these plaintiffs at the time of the "old suit."

3. That this bill has been brought for the purpose of correcting this great judicial wrong.

4. That the facts alleged in this bill upon which these plaintiffs base their claim to the protection of

a court of equity are facts of which the evidence and proof without fault or negligence of these plaintiffs have been discovered subsequently to the trial and appeal of the former cause or "old suit."

5. That in addition to this fraud in the management of the trial of the "old suit" the fraudulent acts were perpetrated in violation of the obligations of a fiduciary relation.

6. That this great wrong that these plaintiffs have suffered was the premeditated and intended result of said conspiracy and fraud on the part of these defendants.

7. That in addition to these foregoing meritorious grounds there are the technical reasons for reversing the decree of the lower court, of an entire want of jurisdiction and the thereby resulting want of "due process of law."

These plaintiffs have come into this court sitting in equity with clean hands, in good faith, and prepared to show that they are chargeable with no fault or negligence on their part; that they have been injured in their rights by those of whom they complain; that they have a right to complain; that the wrong of which they complain is not their own, and that they have not any adequate remedy in a court of law.

The simple questions involved in this case are: whether or not the rightful owners of property shall be protected in their rights against the fraudulent acts of others; whether or not parties who have secured an unjust decree by fraud and imposition on the court shall be allowed to retain the profits of their wrong; whether or not a court of equity will rectify a wrong

which it was deceived into doing to innocent parties; whether or not a court of equity will do justice; whether or not a court of equity will place its stamp of judicial approval upon a gross fraud and imposition that ~~has~~ ^{has} been practised upon it.

There can be but one just and right answer to such questions. Such questions assuredly appeal to the conscience of the chancellor.

Shall justice be done or not be done? Shall the wrong-doer be made to disgorge his ill-gotten gains or not? Shall innocent men be protected in their just rights or not? Shall scheming parties be permitted to abuse the power of the courts or not?

Those are the questions.

It is unthinkable that a court of equity would refuse to correct the injustice that has been done these plaintiffs. We have cited ample judicial precedent to sustain our contentions on behalf of these ~~defendants~~ ^{plaintiffs}. Judicial precedent is not necessary to justify a reversal of the decree of the lower court. The every-day principles of human justice and common honesty are a sufficient foundation upon which to base a reversal of the decree of the lower court. An affirmance of that decree in this appeal would necessarily have to be founded upon a mere technicality which would be destructive of justice. Should no judicial precedent have been found to support the proposition that parties who, by a fraudulently contrived suit based upon falsehoods, which they knew to be falsehoods, and by the preventing of a meritorious defense and the truth from being presented to the court, have succeeded in deceiving the court into making an unjust and untrue

decree, shall, upon the discovery of their fraud and imposition, be decreed to return the ill-gotten fruits of their fraud and iniquity, then it is time that such a judicial precedent should be forthcoming.

A decree reversing the decree of the lower court is not only imperative for the restoration to the rightful owners of the property that has been thus unjustly taken from them, but it is equally if not more imperatively necessary for the removal of the stigma of fraud that also unjustly has been cast upon the good names and reputations of innocent men.

Upon the judicial authorities cited in this brief for appellants, and for the reasons herein given, we respectfully pray that the decree of the lower court sustaining the demurrer to this Bill of Complaint be reversed.

Respectfully submitted,

JOHN P. HARTMAN,
GEORGE M. NOWELL.

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IN THE
UNITED STATES CIRCUIT COURT
OF APPEALS
FOR THE NINTH CIRCUIT

THOMAS S. NOWELL *et al.*,

Appellants,

vs.

No. 2141

THE INTERNATIONAL TRUST
COMPANY *et al.*,

Appellees.

UPON APPEAL FROM THE DISTRICT COURT
FOR THE DISTRICT OF ALASKA,
DIVISION NO. 1.

BRIEF OF APPELLEES

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The Bell Press, Printers, Tacoma, Wash.

FILED

OCT 21 1912

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STATEMENT OF THE CASE

In the year 1905, and for some years thereafter, vigorous and hotly contested litigation was carried on in the District Court for the District of Alaska between the International Trust Company and the financial backers of Thomas S. Nowell, on one side,

and Thomas S. Nowell, the promoter of the Berner's Bay Mining & Milling Company, and his sons and certain corporations named as appellants in this case, on the other side. The litigation has been in this Court on three distinct occasions, and the decisions in each instance have been adverse to the appellants in this case. A detailed description of this litigation is entirely unnecessary, since the same is fully set forth in the decisions of this Court, reported as follows:

International Trust Co. vs. Decker Bros., 152 Federal, p. 78.

Nowell vs. International Trust Co., 169 Federal, p. 497, and

Nowell vs. McBride, 162 Federal, p. 432.

We desire also to call the Court's attention to the decision of the District Court for the District of Alaska in the case of *McBride vs. Nowell*, a copy of which decision is incorporated in record Number 1436 of this Court at page 82.

The present suit is brought for the purpose of setting aside the decree of the lower Court in the case of *McBride vs. Nowell*, which was affirmed on appeal in cause No. 1436 in this Court, entitled *Nowell vs. McBride*. This is an appeal on the part of the Nowells from a decree of the lower court sustaining a demurrer to the third amended bill of complaint and dismissing the action. The bill sets forth the pleadings in the case of *McBride vs. Nowell*, to-

gether with the findings of the lower court in that case and its decree. It is unnecessary here to repeat the contents of those pleadings and the findings. It is sufficient to say that the record discloses that an application was made on the 11th day of December, 1905, in the receivership action for the removal of F. D. Nowell, charging that the appellants in this case were wrongfully withholding the legal title to the three claims in controversy, known as the Northern Light (or Johnson), Northern Light No. 1 and Northern Light No. 2 lode mining claims. The petition charged that Nowell had agreed to convey the claims to the Berner's Bay Mining & Milling Company, and that he had failed to do so, and that by alteration in the offer of sale the records of the Berner's Bay Mining & Milling Company had been falsely made up so as to make it appear that no such agreement had been made on the part of Thomas S. Nowell and these appellants. (See transcript, pages 109-112.)

The lower court declined to remove Frederick D. Nowell, who was a son of Thomas S. Nowell and who was the receiver of the Berner's Bay Mining & Milling Company, but appointed an additional receiver and instructed that a suit be brought to recover the three claims in controversy.

On the 18th of January, 1906, F. D. Nowell and W. B. Hoggatt, as receivers, instituted an action in the District Court for the District of Alaska to recover the legal title to the three claims in contro-

versy. This is the same suit as is reported in this Court as the case of *Nowell vs. McBride*. The complaint in that case charged that Nowell and his two sons, Willis E. Nowell and Arthur L. Nowell, held the control of the capital stock of the Berner's Bay Mining & Milling Company. That Nowell proposed to reorganize the company by increasing the bonded indebtedness from two hundred thousand to three hundred thousand dollars, and by increasing the capitalization from one million to two million and one-half dollars, and that he represented to the stockholders and bondholders of the Berner's Bay Mining & Milling Company that he and Willis E. Nowell would convey to the company fifteen mining claims, including the three claims in controversy, in consideration of the issuance to him and Willis E. Nowell of the increased capitalization of the company, to-wit, \$1,500,000.00. That he and Willis E. Nowell took the increased capitalization of the company and have retained the same ever since, and that he agreed to convey the fifteen mining claims to the company. That by an alteration in the offer of sale which was engrossed in the minutes of the corporate proceeding, the corporate records were made to appear as if he had only agreed to convey *twelve* of the mining claims mentioned, excluding the property in controversy. It was charged that the principal value of the fifteen mining claims lay in the three claims in controversy.

A petition of intervention alleging the same set of facts was filed by Henry Endicott, one of the

stockholders and bondholders of the Berner's Bay Mining & Milling Company, and in addition thereto Henry Endicott alleged that on the 3d day of June Thomas S. Nowell proposed to him to convey the fifteen claims to the company, in exchange for the increased capitalization thereof, if Henry Endicott would purchase \$27,948.35 worth of the then outstanding bonds of the Berner's Bay Mining & Milling Company which were in default. It was further alleged by Henry Endicott that pursuant to said proposition he purchased the bonds described in the offer of Thomas S. Nowell. (In fact, the finding of the lower court shows that he purchased forty-two thousand dollars' worth of bonds instead of twenty-seven thousand.) This petition of intervention was filed for the express purpose of securing a recovery for the benefit of the Berner's Bay Mining & Milling Company on the Endicott contract, in case the court should not be satisfied from the circumstantial evidence in the case that the records of the Berner's Bay Mining & Milling Company had been fraudulently altered; the Endicott contract being in the nature of a contract between two parties for the benefit of a third party, to-wit, the Berner's Bay Mining & Milling Company.

The lower court in its decision found: First, the contract between Nowell and Henry Endicott; second, a contract pursuant thereto between the Berner's Bay Mining & Milling Company and Thomas S. Nowell and Willis E. Nowell; and, third, found that the records of the Berner's Bay Mining

& Milling Company had been fraudulently altered and engrossed so as to show that only twelve of the fifteen claims had been sold to the company. (Tr., pp. 59-87; Tr., 1436, p. 90.)

The record shows that these appellants were represented by attorneys, duly filed their answers setting up all of the issues now set up in the third amended bill of complaint in this case (except the issue that the receivers had no right to bring the suit). Not only this, but it appears that Thomas S. Nowell and Willis E. Nowell were present in court at the trial *in person*. (Transcript page 81.)

The cause was tried on the 27th of April, 1906, and a decree in favor of the plaintiffs in that case was entered on the 9th of January, 1907.

The record further shows that a number of depositions were taken in the case, and the record of this court in cause 1436 discloses an extended cross-examination of all the witnesses for the plaintiff in that case. There is no allegation in the complaint in this case that full cross-examination was not had.

Reference is made by the appellants in their third amended bill of complaint (see Transcript, page 294), to two letters introduced in evidence, taken from two letter-press copy-books and introduced in the receivership cause Number 1641 of this court. It appears from an examination of this record that these letter-books were produced and used in evidence in the month of April, 1907, about three

months subsequent to the entry of the decree in the case of *McBride vs. Nowell*. All of the appellants to this case were parties to case No. 1641, including the attorney for the appellant, Mr. George M. Nowell. The suit now on appeal was instituted on the 2nd of March, 1909, some two years thereafter. (Tr. p. 202.) An examination of these letters exhibited on pages 294-295 of this record will show that they confirm the theory of the appellees in the original suit of McBride against Nowell.

The theory of the appellants' complaint in this case is that, if the contents of these letter-books and other documents had been known to the appellants in this case, they could have made a valid defense to the charge of fraudulent alteration and to the charge that the fifteen mining claims were offered at the meeting of June 24th, 1896, of the Berner's Bay Mining & Milling Company. The whole complaint and brief of the appellant in this case is based upon the theory that the discovery of the contents of these letter-books and other documents in the possession of the appellees was not had until long after the trial and appeal of the case of *McBride vs. Nowell*. (See Transcript, page 184.)

The allegations in respect to this phase of the case are somewhat important and they are found principally in paragraphs 21 and 25 of the third amended bill of complaint. It is alleged at page 115 that Wallace Hackett, one of these defendants, on the 30th day of October, 1905, took the letter-books

and other documents and papers from the Metropolitan Storage Warehouse at Cambridge, Massachusetts, and receipted for them as papers belonging to the Berner's Bay Mining & Milling Company and Nowell Mining Company. It is alleged that a number of these papers were the private and personal property of Mr. Thomas S. Nowell, and at page 143 of the transcript it is alleged that they were his personal and private property because he paid the salary of the stenographer that wrote the documents and paid for the books in which they were kept and for the paper upon which they were written and for the typewriting machine with which they were written.

(It is proper to here note that, if any of the papers related to the matter in controversy, Wallace Hackett, who was a director of the Berner's Bay Mining & Milling Company, had a right thereto as such director, because they related to matters and business of the Berner's Bay Mining & Milling Company and were written by Thomas S. Nowell while he was the president of that company. If any writings were taken from the storage warehouse which were not material to the issues of the case of *McBride vs. Nowell*, and were really the personal property of Thomas S. Nowell, while Hackett's act might have been wrongful, nevertheless it has no bearing upon this case because the discovery would not relate to matters material to the issues in this case.)

It is said that the plaintiffs did not discover that

any of these papers had been removed from the storage warehouse until April, 1907. (Tr., p. 116.) (We presume this date is arrived at from the date of the trial of the foreclosure case, in which the two letters set out in the transcript at page 294 were offered.)

The other allegations material to the question of the alleged suppression of evidence are as follows (See Transcript, page 146): "That in the month of January, 1909, Thomas S. Nowell was stricken with a severe illness and a stroke of apoplexy was narrowly averted; that his general health since said attack has been enfeebled and much impaired." (It is to be noted that this stroke occurred some two years after the rendition of the decree in the case of *McBride vs. Nowell*, and almost three years after the trial of that case.)

It is further alleged that Willis E. Nowell, one of the appellants, knew nothing about the details of these transactions. (See Transcript, page 132.)

And it is further alleged (Transcript, page 199), as follows:

"That at the time of the trial of said Cause No. 519-A, George M. Nowell was the only son of Thomas S. Nowell, who was living in Boston, Massachusetts; that said George M. Nowell had never been employed in any capacity whatsoever in the office of Thomas S. Nowell and was therefore almost entirely unfamiliar with the business transactions of said Thomas S. Nowell, and had no knowledge of the transactions of June, 1896; that the business files of Thomas S.

Nowell were very voluminous, being the accumulation of many years, and that had he been instructed to search for evidence amongst the business files of Thomas S. Nowell he would not have known where to look or what to look for; that, as said George M. Nowell had no knowledge at all of the business files of the said Thomas S. Nowell, a search by him would not have disclosed to him the fact that the said letter-press copy-books had been wrongfully abstracted and removed by said Hackett as hereinbefore alleged and set out."

(The entire weakness of the plaintiffs' case is developed by the last and most remarkable allegation. In passing further it is to be noted that the allegation with reference to George M. Nowell's entire ignorance is contradicted by the records in cause 519-A and by the complaint in this case. At page 111 it will be found that George M. Nowell was the trustee for the one million dollars of stock, which was issued after the meeting of June 24th, 1896, as a consideration for the conveyance of the fifteen claims. This allegation is further substantiated by the exhibits in record Number 1436, which is referred to in plaintiffs' complaint. (See record 1436.)

The record further discloses that at the trial of *McBride vs. Nowell* the defendants admitted in their answer to the intervening complaint of Henry Endicott (see Transcript, page 49), that they had made to Henry Endicott the proposition of June 3d, 1896, substantially as alleged in the intervening complaint of Henry Endicott. At the trial of that case the court found that the proposition had been made, that it had been accepted by Henry Endicott and that

thereafter he and his associates had expended ^{forty} two thousand dollars. No attempt is made to refute these allegations and findings in the present third amended bill of complaint.

In paragraph XIV it is alleged that Henry Endicott and his associates were actuated by another motive in furnishing the forty-two thousand dollars, namely, that they desired to avert the financial failure of Thomas S. Nowell, owing to their interest in his properties. (It is to be noted that this motive is not at all in conflict with the motive of acquiring further and more valuable property, including the claims in controversy.)

The other allegations of the complaint are directed to the claim that in a number of contracts providing for the reorganization of the Berner's Bay Mining & Milling Company the title of these appellees to the Johnson claims was recognized by recitals in such contracts. (It is to be remembered that the appellants herein were parties to these contracts and that they were drawn as plans of reorganization, and proposed by the said Thomas S. Nowell. The only allegation in the complaint with reference to this is that George M. Nowell, attorney for Thomas S. Nowell, did not discover them until the fall of 1909 when he was going through the printed records in the Berner's Bay receivership case. It is sufficient to say that it is not alleged that these documents were among the documents that were abstracted and withheld by Wallace Hackett.

It is further to be noted that the lower court could not assume from the allegations in this complaint that Thomas S. Nowell was actually ignorant of the contents of these contracts.

It is further to be noted that the contracts involving the acquiescence of the Endicotts and others in the claim of these appellants to the title of the property in controversy were discussed and disposed of in the decision in the case of *McBride vs. Nowell*, 162 Federal, page 440.

The only other issue tendered in the complaint is by a set of allegations found in paragraph 26 (Transcript pages 202-4) to the effect that there was no valid subsisting cause of action in the receivership action known as *Decker Bros. vs. Berner's Bay Mining & Milling Company*, and that therefore the receivers were without power to institute the suit of *McBride vs. Nowell* at the time the same was instituted. This latter contention will be disposed of before any of the other contentions in the case.

ARGUMENT

THE POWER OF THE RECEIVERS TO PROSECUTE THE CASE OF NOWELL VS. MCBRIDE CANNOT BE QUESTIONED.

This court held in the two receivership cases, 152 Federal, page 78, and 169 Federal, page 497, that the receivership was improperly instituted and wrongfully continued by Frederick D. Nowell from the month of February, 1898, until the time when proceedings were brought to make the International Trust Company a party to the litigation. An examination of the decisions above cited will show that in the month of December, 1905, the Nowells acting through the receiver and their various companies caused the Trust Company to be made a party to the action, and that the Trust Company appeared in the receivership action on the 5th day of March, 1906. An examination of the decisions and records in that case will show that Mr. Frederick D. Nowell, the receiver, secured an allowance of all of his accounts from that date until the date of his removal, and that they were paid as preferential claims. There is no question, then, but that when the cause of *McBride vs. Nowell* was tried on the 27th day of April, 1906, the receivers were fully authorized to prosecute the action. No objection was made in that action to the power of the receivers to sue, nor is the issue tendered with reference to this phase of the case one which could not have been tendered by the exercise

of reasonable diligence at the time of the trial of that cause and the entry of the decree.

The date when the Trust Company appeared in the action is given in 169 Federal at page 499 as follows:

“On March 5th, 1906, the Trust Company answered.”

In the opinion we find the following statement with reference to the appearance of the Trust Company, and the validity of the proceedings thereafter (169 Federal 504):

“During the whole time from his appointment as receiver until the appearance of the International Trust Company, a period of nearly eight years, there was no controversy before the court.”

UNDER THE DECISION OF THE SUPREME COURT IN THE THROCKMORTON CASE, AND OF THIS COURT IN THE NELSON CASE, THE BILL FAILS TO STATE A CAUSE OF ACTION.

Having disposed of the last issue, which is the only one extraneous to the original suit of *McBride vs. Nowell*, we submit to this court that since the decision in the case of *The United States vs. Throckmorton*, 98 U. S. 61, and the decision of this court in the case of *Nelson vs. Meehan*, 155 Federal, page 1, there can be no question but that perjury, even if it were committed in the lower court at the trial of the

former case, is not ground for setting aside the judgment therein.

The bill in this case is so long and complicated that it would simply be a useless repetition to recite the allegations thereof in a brief, but the whole gist of the bill is that the intervenor and the plaintiffs in the case of *McBride vs. Nowell* and those assisting them were guilty of perjury in procuring the decree below. No new issues are tendered by the present third amended bill that were not tendered in the case of McBride against Nowell, except the issue as to the power of the receivers to sue. In this respect all that we ask is a careful examination of the complaint in the case and an examination of the opinions above cited.

If the fraud complained of in this case was not extraneous to the issues tendered in the previous case, there certainly can be no right to recover under the third amended bill.

In the Throckmorton case the rule is clearly stated as to what class of cases the exception applies. It is to those cases where the defendant in the previous trial had judgment rendered against him under circumstances where he was really kept out of court. The Supreme Court uses the following language:

“Where the unsuccessful party has been prevented from exhibiting fully his case by fraud or deception practiced on him by his opponent, as by keeping him away from court or by a false offer of compromise, or

where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff, or where an attorney fraudulently or without authority assumes to represent a party and connives for his defeat, or where the attorney wrongfully employed corruptly sells out his client's interest to the other side—these and similar cases which show there has never been a real contest in the trial, or hearing of the case, are reasons for which a new suit may be sustained to set aside or annul the former judgment or decree and open the case for a new trial and a fair hearing.”

It is perfectly clear that the present case does not come within the rule of exception laid down in the Throckmorton case, and it is perfectly clear also that the case of *Marshall vs. Holmes*, 141 U. S. page 589, has not modified the rule laid down in the Throckmorton case. In this connection the following language is quoted in the decision of this court in the case of *Nelson vs. Meehan*: “Until the attention of this court is called to some decision of the supreme court other than *Holmes vs. Marshall* criticising or limiting the doctrine in *U. S. vs. Throckmorton* it would seem that the principal of *stare decisis* should preclude its entertaining a bill which seeks to vacate or annul a judgment solely on the ground that such judgment was procured by the means of the perjured testimony of the party whom it benefits.”

In the case of *Marshall vs. Holmes* the plaintiff was absent at the time of the trial and had no opportunity to inspect a perjured document upon which the case turned at the trial. How unlike that case is the present case. The findings of fact show that de-

defendants were not only represented by counsel at the trial, but that the two principal defendants, Thomas S. and Willis E. Nowell, were present in person and failed to offer any explanation of the charge of fraudulent conduct (Transcript, page 81). It also appears that no motion for continuance on the grounds of surprise was made at the time of the trial of the cause, and no attempt made in any way to secure evidence to rebut the evidence offered by the plaintiffs in that case.

THE THIRD AMENDED BILL OF COMPLAINT DOES NOT SHOW DILIGENCE ON THE PART OF THE DEFENDANTS IN THE ORIGINAL SUIT IN PREPARING THEIR DEFENSE.

The rule in this respect is correctly stated in the article on Judgments by Mr. Henry Campbell Black, found in Vol. 23 Cyc, page 1030, and is as follows:

“Equity will not grant relief against a judgment on the ground of newly discovered evidence, if the evidence could have been discovered before trial by the exercise of care and diligence in searching for it or interrogating persons cognizant of the facts.”

The complaint in this case does not reveal a single effort on the part of the appellants to secure any of the evidence (which they now desire to offer) before the trial of the former case. It must be assumed that the appellants, including Thomas S. Nowell, knew where their books and memoranda had been left. There is no allegation that an attempt was made to discover the whereabouts of the evidence in the storage warehouse prior to the trial of the orig-

inal case. It is evident that Mr. George M. Nowell, Thomas S. Nowell's attorney in Boston, was never asked to look for any evidence among the documents and papers which they now claim are material, for he alleges as follows (Transcript, page 200) : "That had he been instructed to search for evidence amongst the business files of Thomas S. Nowell he would not have known where to look or what to look for." In the taking of the depositions none of the witnesses were examined with reference to the whereabouts of further evidence or books, papers and documents, nor was any request for the production of books, papers or documents refused to the appellants. Upon the hearing resulting in the dismissal of the above entitled cause (Transcript, page 310) it is recited that at the invitation of the defendants the court was asked to take particular notice of pages 346, 371 and 372 of the printed record in cause Number 1436. An examination of these pages shows that an inspection of those books, papers and documents which Mr. Thomas S. Nowell desired an inspection of was given to George M. Nowell by the Endicotts in Boston in the fall of 1905.

Mr. Black lays down the further rule, 23 Cyc. page 980, as follows:

"Equity will refuse to relieve a party against a judgment which results from his own negligence or carelessness in failing to plead or defend the original action or otherwise watch over, protect and assert his rights in that proceeding, or where he has negligently omitted having full knowledge of the facts to appeal in due season for such remedies as were open

to him by appeal or writ of error, by a motion for a new trial *or by proceedings to vacate the judgment.*"

Applying the rule above stated to the facts in this case we find that the case was tried on the 27th of April, 1906, and that no effort to reopen the case was made between that time and the time the decree was entered on the 9th day of January, 1907 (see transcript, pages 88 to 94), and we further find that the appellants had notice that the appellees were in possession of letter books, documents and papers referred to in the third amended bill of complaint in the month of April, 1907 (see transcript, pages 186 and 192), when the letters set forth on pages 294 and 295 of this transcript were introduced as evidence in the receivership case.

Under section 93 of the Alaska Code of Civil Procedure, relating to vacation of judgments, it is provided as follows:

"And the court may in its discretion and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect."

It will be seen from this section that the appellants, if they had a valid cause for reopening the decree, still had between eight and nine months left after April, 1907, in which to move to vacate the decree in the original case before the expiration of a year from the date of the decree. This they failed to do, and under the rule above stated this failure would

preclude a court of equity from entertaining the bill of complaint in this case.

Stripping the bill in this case of its argumentative portions, epithets, and all its general allegations in the shape of conclusions, we simply have this state of facts: Hackett took the books and papers relevant to the issues in this case in October, 1905, from the storage warehouse. He kept them, and the plaintiffs in the original suit used such of those books and papers as they deemed material to the issues in the original case and introduced the same in evidence. The real complaint of the appellants in this suit is that the plaintiffs in the original suit and their attorneys should have tried the defendants' case for them, or should have revealed to them evidence which they now claim existed which would have assisted them in their defense, and which they had not been diligent in attempting to procure. Such is not the law. The following is the rule laid down by Mr. Black, 23 Cyc. 1026:

"On the other hand, no party is bound to furnish weapons to his adversary or plead himself out of court, and the mere fact that he keeps silent and does not communicate to the court or to the adverse party facts which would defeat his recovery, is not such fraud as will justify a court of equity in enjoining the resulting judgment."

And Mr. Pomeroy in his work on Equity Jurisprudence, Vol. 6, Section 654, lays down the rule as follows:

"Fraudulent concealment is sometimes relied up-

on as a ground for equitable relief against judgments. In order that concealment shall be ground for any equitable relief, there must be a duty to disclose. Ordinarily when there are two parties on an equal footing before the court, there is no such duty. The concealment which is ground for relief generally arises in an *ex parte* proceeding where the court is deceived by facts concealed by the applicant for relief. Where fraudulent concealment is relied upon for the purpose of impeaching and setting aside a judgment regularly obtained, it must be an intentional concealment of a material or controlling fact, for the purpose of misleading or taking an undue advantage of the opposite party. That the adversary has not communicated facts which tend to defeat his claim or to impeach his witnesses is not ground for relief. An adversary cannot be expected to furnish the means for his defeat."

On the theory of acquiescence the appellants claim that since the trial of the original suit they have discovered a number of contracts to which appellants were the principal parties, wherein recitals were contained to the effect that the title to the Johnson property lay in the appellants. The question of acquiescence was gone into in the trial of the original suit, and in the latter part of the opinion, 162 Federal, page 440, Judge Gilbert disposes of the charge against Mr. Endicott and against the receivers in this respect, and uses the following language:

"The appellants earnestly insist that the laches of the appellees is such as to bar their right to equitable relief. It is not shown that the values of the mining properties in controversy have increased since the time when the contract for their sale was made. As to the delay of the intervener, Endicott, in asserting

his rights, his testimony is that he did not discover the fraud until some six months after the stockholders' meeting and that at that time, in a conversation with Thomas S. Nowell, the latter informed him that the reason why the mines had not been conveyed was 'that they could not convey them for they had not procured the patent yet.' Endicott testified, further, that thereafter he made search for Nowell's letter to him of June 3, 1896, concerning the proposed sale of the 15 mining claims to the company, but that he could not find it until 1900, and that *thereafter Nowell was making endeavors to sell the Berner's Bay and Johnson property together, and that he (Endicott) was more anxious to realize on such deal than to delay the consummation of the same by litigation over the title of the Johnson properties.* But he testified that on finding the letter he sent a copy thereof to Nowell and informed him 'that we consider we have at least a moral claim on the Johnson property.' "

The bill does not charge that Mr. Thomas S. Nowell had no knowledge of these contracts, to which he was the principal party. When carefully read it simply charges that Mr. George M. Nowell did not know anything of the contracts until the fall of 1909, when he discovered them in an appellate record in a case to which he had for some years been a party.

(See transcript pages 193 and 194).

IF THE APPELLANTS IN THIS CASE WERE ABLE TO PROVE ALL THAT THEY CLAIM THE ABILITY TO PROVE, STILL THEY WOULD NOT BE ENTITLED TO RECOVER HEREIN.

At the conclusion of appellants' complaint at page 209 we find a paragraph partly italicised which

shows the full and entire contention of the appellants in this case. It is as follows:

“That there was no contract concerning the said Johnson group between the Berner’s Bay Mining and Milling Company and T. S. Nowell, and that *said corporate records directly state the entire proceedings at the said June 24th meeting.*”

On the question of the alteration of the corporate records the original suit was tried entirely upon circumstantial evidence and a correct conclusion reached. For the purpose of argument, however, let us concede that the affidavit of Mr. Payson, found at page 265 of the record, and annexed to the original bill of complaint, states the truth, namely, that the corporate meeting was attended only by Arthur L. Nowell, Thomas S. Nowell’s son, by C. O. Barrows, Mr. Payson’s stenographer, and by Mr. Payson, Thomas S. Nowell’s attorney, and that prior to the meeting he had at Nowell’s command altered the offer to sell the 15 mining claims by inserting the words “last twelve,” thereby excluding the property in controversy from the offer of sale. What position, then, do we find the record in? We find, nevertheless, that in the month of June, 1896, the total capitalization of the Berner’s Bay Company was one million dollars, and that the company was controlled by Thomas S. Nowell, Willis E. Nowell and Arthur L. Nowell, Thomas S. Nowell holding 4,496 shares, Willis E. Nowell holding 457 shares, Arthur L. Nowell holding 96 shares (see Transcript, page 96), and that the property was mortgaged for two hun-

dred thousand dollars (see Transcript, page 66). That on the 3rd of June, 1896, Thomas S. Nowell, the promoter and president of the company, made the following proposition to Henry Endicott (see Transcript, pages 70 to 72) :

“ ‘Thomas S. Nowell,
5 Tremont Street,
Boston, Mass.
June 3, 1896.

“Henry Endicott, Esq.,
Boston, Mass.

My dear Mr. Everett: After my conversation with you, I herewith submit the basis of a proposition that I have for a purchase of bonds from New York parties who desire not to be known as sellers of the bonds and who have a use for their money in another direction. The proposition is as follows:

46 Berner's Bay bonds of \$1,000.00 each and 292 shares of the capital stock of said company. The par value of the bonds and stocks is \$75,200.00, and accrued interest is \$1,878.33 to June 15th, making in all \$77,078.33. Now it will require to purchase this interest in cash not later than June 15th, \$47,948.33. We practically get the stock for nothing, 292 shares, with a par value of \$29,200.00, and as to the value of that stock it goes without my repeating as to my appreciation of its value which is today as high as it ever was.

Now, in order to carry out my plan, which I believe I can do, providing I get control of these bonds and stock, getting rid of the element that have taken the stand that they are not willing to extend these bonds, I can see my way clear to raise of this amount \$20,000.00, so that there will be \$27,948.33 more to raise and the stock to be distributed pro rata between my friends that take the \$20,000.00 and those that take the balance. I regard it as of vital importance that this be accomplished, and I am satisfied that it

can be. I herewith submit my plan that I have talked over with you today which is as follows, viz:

To increase the captial stock of the company to two and one half million dollars; to increase the bonded indebtedness of the company to \$500,000.00. It is now \$200,000.00; to set aside \$500,000.00 of this stock to be used as far as may be found necessary for the purpose of retiring the present \$200,000.00 bonds for the purpose of selling the \$300,000.00 at par and the balance of the increased capital to be paid over to me or anyone that I may direct, for the turning over to the company what are known as the Johnson mines which are known to be of great value and beyond that twelve other claims which are all right in connection and should be worked with the Berner's Bay present properties. I consider these properties that I should turn over to the company of certainly as great a value if not more than the present holdings of the company; in fact I believe that the Johnson properties have more real value in the deposit than all of the present holdings of the Berner's Bay Co., and then aside from that I claim that the surface indications are very much richer than the Comet was at the same stage of development.

I am willing to accept this stock on the basis that as a consideration for the payment of all these properties, that it shall not participate in the dividends of the Company until the original stock has realized 100 per cent. in dividends, that is the full capitalization of which one million dollars shall be paid in dividends before the increased stock that I receive in payment for these properties participate in dividends. All other rights and privileges of the stock I would enjoy excepting the right of receiving dividends on it until the old stock has received the 100 per cent. as hereinafter specified.

To Recapitulate.

Increase the capital stock of the Berner's Bay Mining and Milling Company from \$1,000,000.00 to

\$2,500,000.00. Set aside \$500,000 of the increased capital stock to be used as far as necessary in retiring the \$200,000.00 bonds and floating the balance of the \$500,000.00 as a new purchase for fresh money. Should any of this \$500,000.00 stock be saved the same to be for the benefit of the Treasurer. Purchase of T. S. Nowell the adjoining claims which he has control of to be deeded to the company and \$1,000,000 of capital stock to be issued to him in payment, the said stock not to participate in stock dividends until the original stock has received 100 per cent.

46 bonds of the Berner's Bay M. & M. Co.	46000.00
7 months accrued interest to June 15th	1878.33
292 shares of capital stock, par value	29200.00

77078.33

This can be had for the sum of \$47,948.33, provided payment is made on or before June 15th, 1896.

T. S. Nowell will agree to raise and take \$20,000.00 of the above sum of 20 bonds and accrued interest, \$20,816.00."

Pursuant to this most definite offer, Henry Endicott and his associates raised \$42,736.58 and bought the bonds described in the foregoing written communication of June 3rd. It appears further that at least one (say two) notices of stockholders' meeting was issued. In both of these notices it was proposed that the claims in controversy be conveyed to Berner's Bay Company; that a meeting was held on the 24th of June, 1896, that nobody was present at the meeting except agents of Nowell, and that the records were written up to show a sale of only 12 of the 15 claims, excluding the claims in controversy.

Further, that neither Endicott nor his associates had ever relieved Nowell of his obligation to carry

out the agreement of June 3rd, and further that Willis E. Nowell (through George M. Nowell as trustee) and Thomas S. Nowell accepted the full purchase price contemplated for the fifteen claims, to-wit, one million five hundred thousand dollars worth of stock, and have retained that purchase price ever since. That they have never offered to return the consideration or any part of it; that the principal value in the 15 claims lay in the three claims in controversy, and that they have never offered to reimburse Endicott and his associates for the \$42,000 paid by them under the representations made in the document of June 3, 1896.

An examination of the opinion of the lower court in the case of *McBride vs. Nowell*, and of the findings of the lower court, shows that the decree of specific performance was supported first, by the *contract with Endicott*, and second, by the proceedings of the meeting of June 24th, 1896.

The appellees in this case would feel great reluctance in appealing to the rule in the case of *U. S. vs. Throckmorton*, no matter how well founded its policy, if an injustice were to ensue therefrom, but the inequity of the plaintiffs' pleading is so thoroughly demonstrated that we feel the case must fail upon the proposition that there is no equity in the pleading irrespective of the rule in the *Throckmorton* case.

No attack is made upon the finding that the Endicotts parted with \$42,000. The bill simply alleges

that the acquisition of the Johnson claims was not the *motive* which actuated the Endicotts in parting with the \$42,000.00. We submit that this allegation is simply a conclusion, and cannot be treated seriously in view of the express offer of Mr. Nowell to convey the claims in his communication of June 3d. No court will permit him to plead a different motive or consideration than that which he induced by the terms of document of June 3d, whereby he secured the forty-two thousand dollars.

The appellants' attitude in this case, simply stated, is this: "We are entitled to relief because *Thomas S. Nowell* offered to convey the property in controversy if the Endicotts would raise the money required by the proposition of June 3d, but this offer was conditional upon the approval of the Berner's Bay Mining and Milling Company." Who was the Berner's Bay Company? Without question it was *Thomas S. Nowell*. In other words, it is claimed that Mr. Nowell said to Mr. Endicott, "Raise for me forty-two thousand dollars. If after you have done this, I, as the *Berner's Bay Company*, when I meet on the 24th of June, 1896, should see fit to ratify your agreement and mine, then I will deed the property," and finally a long time afterwards he says to Mr. Endicott, "I have your forty-two thousand dollars, but I am sorry to state that I as the Berner's Bay Company when I met decided not to ratify the proposition which I made to you, although I and my son have taken all of the capital stock that we originally

proposed to take, and are retaining the purchase price named in my proposition to you of June 3rd." This is all there is to the third amended complaint. The contention herein is almost as absurd as the contention made at the trial of the original cause, which is described by the lower court in its opinion in that case in discussing the Endicott contract of June 3rd, 1896 (see Transcript 1436, page 90), as follows:

"It is clear that here was the basis for a contract for the sale of the Johnson Group and twelve of the claims conditioned upon a certain act to be done by Endicott. This act was the purchase of certain bonds, which were or were about to be in default. Nowell had the ability to carry out his part of the contract, for through his power of attorney from Willis E. Nowell, who then held the equitable title in the Johnson Group which he could convey, he was in a position to place the Berner's Bay Company in the possession of the Willis E. Nowell's title, which might thereafter be ripened into a title in fee. On the other hand, Thomas S. Nowell at that time controlled a majority of the stock, and could, had he seen fit, have voted the purchase of the Johnson Group for any price which suited him. That there was a consideration running to Endicott was plain. The company in which he held stock and in which he was a director had defaulted some of its bonds, and was about to default upon others. It was then upon the eve of a receivership, or foreclosure of the mortgage, and the transfer to it of valuable properties would restore the company to a strong footing again, and increase the value of his holdings, to say the least, thus benefiting him. Clearly, here was a conditional contract of sale, provided he accepted the proposition.

It is equally clear that he did accept the proposition. Certainly, he purchased all that Nowell proposed and more, the undisputed testimony showing

that Endicott and certain associates whom he interested purchased 41 of the 46 bonds mentioned, and paid therefor the sum of \$42,736.58. *But the defendants now contend that he bought too much; that in taking more than the 27 bonds mentioned in the proposition, he went beyond the terms of the contract, if it was a contract, and that he cannot now seek to recover on it. We cannot agree with the counsel in this contention, but think that he performed the condition that made the contract binding upon the Nowells. Nor do subsequent events bear out defendants' position.*"

Before closing this brief we desire to quote herein the only two letters from the press copy-books which Mr. George M. Nowell, the attorney for the appellants, is willing to exhibit in the third amended bill as having been discovered by him since the trial of the original suit. They are as follows (Transcript, 294-5) :

(Letter written to Willis E. Nowell by Thos. S. Nowell and dated July 17th, 1896, reads as follows:)

"I propose to pay the Johnson drafts the coming week, so that if Fred can carry out my suggestion with Johnson beyond that *and have the mines deeded to the company* it will be all right, and if not it will be all right, because I shall make the payments and then the deeds can be made direct to the B. B. Co. after the payments are made. I am very glad that I decided not to have the Johnson mines deeded to the company so as to be on the safe side."

(Letter dated at Boston, August 11th, 1896, written by Thomas S. Nowell to F. D. Nowell, which reads as follows:)

"I wrote you yesterday in regard to what you

had to say in regard to the Johnson properties. I hope to telegraph to the credit of Johnson to the Bank of British Columbia \$25,000 within the next week, and have them notify Johnson of the payment and have them return the draft should they still have it in their possession; otherwise, if it has been returned to Mr. Johnson, he can turn it over to you when you are advised of the payment, but you must protect it if it is necessary. I have answered you fully in regard to the Johnson mines and when Willis received the papers showing the transaction I have made and that we really control over three-fifths of the entire Berner's Bay interests. *In view of the liberal recognition that my friends have given me here, I think it will be unwise not to fulfill what I have already agreed to put into the company on the last deal.* Mr. Plummer thinks that I am very mean in recognizing the people that have helped me to carry matters along, and in view of this fact if I should do what you suggest in regard to the Johnson mines, why it might augment that sentiment here."

We feel it would be an unnecessary trespass on the time of the court to discuss the question involved in this case further after these letters have been read, and after the fact has been developed from this record that the Nowells still retain the benefit of the forty-two thousand dollars and still retain the full purchase price which Nowell asked for the fifteen claims.

The inequity and absurdity of the plaintiff's bill in this case can be no better demonstrated than by a careful reading of the allegations found in the bill at pages 125 and 126 of the transcript. It is there alleged: "That Thomas S. Nowell was making continued efforts to effect some arrangements with the

then owners of the Johnson group which should result and was intended to result in a conveyance of the same to the company * * * and did not cease his efforts to secure a conveyance of the Johnson group to said company by a pledge of its mortgage bonds as security for the payment of said purchase price until it was found impossible so to do, *whereupon it was found necessary* that the said *Nowells should pay out of their own resources* the said purchase price of twenty-five thousand dollars *and take title to the Johnson group themselves."*

(It is to be noted that nothing was said in the proposition of June 3d, 1896, about any money being still due upon the purchase price of the Johnson group.) The allegations above quoted, when reduced to plain language, are these: Thomas S. Nowell tried everywhere *except with himself, Thomas S. Nowell*, to borrow twenty-five thousand dollars on his own company's bonds so as to comply with his agreement with Endicott (even after June 24th, 1896), but, being totally unsuccessful, he was *forced, alas! to take his own money and buy the property for himself*, personally. Such is the *equitable (?)* tenor of the whole third amended bill of complaint. It is hardly necessary to cite authorities upon the rule that a meritorious defense must be set up in any proceeding attacking a judgment or decree. The rule, without any dissenting authorities, is set forth in Volume 23 of Cyc., at page 1031, as follows: "A court of equity will not interfere with the enforcement of a judgment recovered at law unless it is unjust and

unconscionable, and therefore such relief will not be granted unless the complainant shows that he has a good and meritorious defense to the original action." This rule has recently been followed and discussed by the Supreme Court of the United States in the case of *Pickford vs. Talbot*, found in the advance sheets of the last volume of the Lawyer's Co-operative Edition at page 687.

Before closing, we further desire to request that this court read plaintiff's Exhibit "D," found in the transcript at page 240, being a letter from Mr. William Endicott to Mr. Thomas S. Nowell, dated July 18th, 1905. A most excellent idea of the manner in which Mr. Nowell treated his financial backers may be obtained from this letter.

We venture to hope that the opinion of the lower court may be affirmed upon the last phase of the case discussed in this brief, rather than upon the rule laid down in the Throckmorton case, which, without doubt, also has application; but, in any event, we submit that the decree should be affirmed.

Respectfully submitted,

LEWIS P. SHACKLEFORD,
SHACKLEFORD & BAYLESS,
Attorneys for Appellees.

No. 2141.

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

THOMAS S. NOWELL, WILLIS E. NOWELL,
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COMPANY (a Corporation), and the ALASKA
NOWELL GOLD MINING COMPANY (a Cor-
poration),

Appellants,

vs.

INTERNATIONAL TRUST COMPANY (a Corpo-
ration), HENRY ENDICOTT, WILLIAM
ENDICOTT, WALLACE HACKETT, C. R.
CORNING, R. McM. GILLESPIE, and S. W.
FAIRCHILD,

Appellees.

Upon Appeal from the United States District
Court for the District of Alaska,
Division No. 1

REPLY BRIEF OF APPELLANTS

JOHN P. HARTMAN,
GEORGE M. NOWELL,
Attorneys for Appellants.

FILED

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Owing to the fact that we have been forced to correct several inaccuracies of statement and references to extraneous matter, which counsel for appellees have inadvertently made, doubtless owing to the intricacies of the complicated state of facts in this record, we have been obliged, much to our regret and against our desire, to expand this Reply Brief beyond the limits to which we had originally hoped to confine the same.

The litigation referred to (Appellees' Brief, p. 4) in 152 Fed. 78, and 169 Fed. 497, has reference to certain receivership questions of the Berners Bay Company, which have no direct relation to the issues involved in 162 Fed. 432 (always referred to as the "old suit") and this present appeal.

The only connection that 169 Fed. 497 has with this appeal is an indirect one, reference having been made in this present bill to certain evidence that was adduced in that suit, which evidence, when taken with certain letters previously discovered, enabled these appellants to discover the conspiracy and fraud alleged in this present bill (*Tr.* pp. 192, 193).

The veiled and misleading character of the allegation of fraud in the "old suit" (*Tr.* pp. 16, 38) will be readily seen when compared with appellees' statement at middle of page 5 of appellees' brief.

Appellees there state that the petition alleged that "by alteration in the offer of sale the records of the

Berners Bay Mining and Milling Company had been falsely made up so as to make it appear that no such agreement had been made" (*i. e.*, to convey the Johnson Group).

This statement of appellees conveys the impression that the allegation was of an alteration of the *records themselves*.

As a matter of fact this is exactly what these appellants believed they had to defend against (*Tr.* p. 136), whereas it later developed that it was an insertion of the words "last twelve" in a rough draft of an offer dated June 22, 1896, two days before the meeting (*Tr.* pp. 155, 156).

In view of the above-mentioned statement by appellees it is not difficult to see how these appellants were actually misled by the vague and misleading allegation of fraud in the "old suit."

In this connection it is important to bear in mind that these defendants did not produce a scrap of paper in the "old suit" that would have enabled T. S. Nowell to refresh his memory and recollect his meritorious defense.

It is the letter-books that have enabled T. S. Nowell to recollect his defense (*Tr.* pp. 146, 147), and these were not produced in evidence by appellees in the "old suit" (*Tr.* pp. 148, 153, 155, 156).

This is one of the vital, controlling facts in this appeal, and should be borne particularly in mind in considering the complicated facts of this record. This fact will be adverted to later on in this Reply Brief.

The complaint and petition of intervention in the "old suit" do not mention Arthur L. Nowell as being one of the parties in control of the Berners Bay Company, as stated in Appellees' Brief, p. 6 (*Tr.* pp. 10, 30).

The allegation (Appellees' Brief, p. 6) in the "old suit," that \$1,500,000 of stock was issued to T. S. and W. E. Nowell, in consideration of the conveyance to the company of the said fifteen (15) claims (*Tr.* pp. 15, 37), **is controverted by the unsigned memorandum itself**, which appellees set up in full in their brief at pages 26, 27 and 28, as being the contract that was actually entered into.

This unsigned writing stipulates that \$500,000 of this \$1,500,000 of stock shall be set aside for retiring the old bonds and floating the new bonds and any balance remaining to be for the benefit of the treasurer (treasury) (Appellees' Brief, p. 28). This \$500,000 of stock was issued to T. S. Nowell for the use and benefit of the Berners Bay Company, and not to the Nowells personally.

Appellees state (Brief, p. 6):

"That by an alteration in the offer of sale which was engrossed in the minutes of the corporate proceeding, the corporate records were made to appear," etc.

THE COMPLAINT DID NOT ALLEGE ANY SUCH THING.

The complaint alleged "upon information and belief":

“That after the date of said stockholders’ meeting, and after said sale of said fifteen mining claims to said corporation, as aforesaid, by the insertion in an offer of sale recorded in the minutes of the said stockholders’ meeting of the words ‘last twelve,’ the true intent and meaning of said transaction was wrongfully and fraudulently changed and altered” (*Tr.* pp. 16, 38).

A comparison of the two foregoing statements will show how far the allegation itself was removed from what these appellees fraudulently intended to prove and did prove in the “old suit,” as shown by appellees’ statement (*Brief*, p. 6) hereinbefore referred to.

These vague pleadings misled appellants into believing that they had to prove that the *records themselves* (*Tr.* p. 136) *had not* been fraudulently changed and altered. The pleadings did not disclose any ambiguity to the minds of appellants at the time of the trial.

Appellants did not fully discern this scheme and conspiracy in all its tortuous ramifications until sometime after September 1, 1910 (within four months prior to the filing of this bill on February 6, 1911), by means of an inspection of all the books which these appellees had concealed and suppressed (*Tr.* pp. 137, 197, 198).

The placing in juxtaposition of these two statements clearly shows why and how these appellants were “fooled” into believing that it was the records themselves that they were charged with having fraudu-

lently altered and changed, whereas another state of facts was what these appellants should have provided against, and why and how these appellants “were groping in the dark” as to what they should do to defend themselves in the “old suit.”

Appellees state (Brief, p. 7), that the petition of intervention of Henry Endicott

“was filed for the express purpose of securing a recovery for the benefit of the Berners Bay Mining and Milling Company on the Endicott contract, in case the court should not be satisfied from the *circumstantial evidence in the case that the records of the Berners Bay Mining and Milling Company had been fraudulently altered;*” (Italics ours.)

Here we have it again stated by appellees that the “records” were fraudulently altered.

It is no wonder that these appellants were “deceived and misled” as alleged (*Tr.* p. 137).

An examination of the pleadings in the “old suit” (*Tr.* pp. 4–44) will demonstrate clearly to the minds of this court that appellees’ pleadings *were not* in any way framed in the alternative.

THE ISSUE WAS OF FRAUD AND FRAUD ALONE.

That is the issue on which these appellees got into court in the “old suit” (*Tr.* pp. 16, 38).

Appellees thereby sought to avoid the legal effect of their ten years of delay in bringing the “old suit” (*Tr.* p. 173). This allegation is admitted by the demurrer.

Appellees are now seeking to change the whole theory of the case from one alleging fraud to that of contract, *i. e.*, from tort to one sounding in contract.

However, the changing of the theory of the "old suit" from tort to contract does not in any way aid appellees, for the simple reason that a suit founded on the alleged contract, after ten years of delay, for which no excuse was pleaded, should, without an allegation of fraud, have been dismissed on the authority of *Moore v. Nickey*, 133 Fed. 289, Judge Gilbert speaking for this court of appeals.

The statement of appellees (Brief, p. 8), that the answers in the "old suit" set up "all of the issues now set up in the third amended bill of complaint in this case" except jurisdiction, is not true and will be discussed later on in this Reply Brief.

As regards the statement, "that Thomas S. Nowell and Willis E. Nowell were present in court at the trial *in person*" (Appellees' Brief, p. 8), it is to be remembered that neither of the Nowells saw any of the papers in question and were given no opportunity to explain or defend (*Tr.* pp. 136-141).

In connection with this point raised by appellees it is very important to bear in mind **five controlling facts**:

1. That the contents of the letter-books that were secreted and purloined by appellees are the specific and only things by which T. S. Nowell has been enabled to refresh his memory and fully set out his defense in this present bill (*Tr.* pp. 146, 147, 195, 117).

2. That these letter-books were concealed by these appellees during the whole trial of the "old suit," although they were given notice to produce (*Tr.* pp. 138, 140, 116, 117, 118, 148).

3. That all the books and papers by means of which T. S. Nowell could refresh his memory concerning the transactions of June, 1896, were in the wrongful possession of appellees (*Tr.* pp. 132, 133).

4. That not a scrap of paper was put in evidence in the "old suit" by these appellees that would have enabled T. S. Nowell to have recollected and made his meritorious defense in the "old suit" (*Tr.* pp. 153-156).

5. That all the evidence produced by these appellees in the "old suit" did not enable T. S. Nowell to recollect his meritorious defense, nor has it since enabled him to (*Tr.* pp. 145, 146).

Therefore, in answer to appellees' contention, that the appellants Nowell "were present in court at the trial *in person*" (Appellees' Brief, p. 8), we specifically call attention to the condemnatory fact that:

During that whole trial these appellees wrongfully concealed every scrap of evidence they had at that time in their wrongful possession which could or would have enlightened T. S. Nowell concerning those facts of ten years before which constituted his meritorious defense.

None of the evidence that appellees did produce in the "old suit" has enabled T. S. Nowell to recollect his defense. The letter-books, and the letter-books

alone, have enabled him to do that. These letter-books were concealed by appellees during the *whole trial*.

Under such circumstances what right have appellees to maintain that T. S. Nowell should have “explained” because he was present in court in person at the trial, when during that whole trial these appellees concealed and suppressed the very evidence that would have enabled T. S. Nowell to explain?

To protect wrong-doers on the ground that an innocent party did not make the explanation that the wrong-doers themselves actually and intentionally prevented the innocent party from making would be the supreme height of injustice.

Moreover, these allegations describing the acts done by these defendants in pursuance of their fraudulent conspiracy are admitted by the demurrer, and we submit that it is not permissible to attempt to try this case on the merits on a demurrer in a court of appellate jurisdiction.

The credibility of statements contained in the bill cannot be impugned on a demurrer (6 How. (U. S.) 114, 118, 119. Appellants’ Brief, p. 47).

Therefore we submit that any facts used argumentatively by appellees to show that the “old suit” was right on the merits cannot be considered in the decision of this appeal on the allegations contained in this bill and exhibits upon a demurrer to the bill (111 U. S. 518; 131 U. S. 151, 158. Appellants’ Brief, pp. 46, 47).

The question is: Have these appellants stated a cause of action?

The decision of that question depends solely and entirely upon the adequacy of the allegations contained in this bill and the exhibits thereto attached.

It is alleged in this bill that the decree in the "old suit" was unjust and untrue, which the trial court was deceived into making as a result of the conspiracy and perjury of these defendants (*Tr.* pp. 183, 132, 133, 138, 139, 150, 151). These allegations are admitted by the demurrer.

The facts showing the reason why the decree in the "old suit" was untrue and unjust, and how the trial court was deceived into making that untrue and unjust decree, are alleged at great length and with minute particularity in this bill (*Tr.* pp. 115-152, 210, 211, 183).

IT IS NOT PERMISSIBLE TO APPELLEES, IN THE FACE OF THOSE ALLEGATIONS, UPON A DEMURRER THERETO TO ARGUE THAT THE DECREE IN THE OLD SUIT WAS A TRUE AND JUST DECREE.

Also the reference to the record of case No. 1436 (Appellees' Brief, p. 8) is not permissible as being entirely outside of the record of this appeal, for the reasons given and upon the authorities cited in support thereof (Appellants' Brief, pp. 46, 47).

The statement (Appellees' Brief, p. 8) that the two letter-books in question were used in evidence in the receivership suit (No. 1641), in April, 1907, must

be considered in connection with the important facts that **AT THE TIME THE SAID LETTER-BOOKS WERE SO PRODUCED THE APPEAL OF THE "OLD SUIT" HAD BEEN COMPLETED, AND WAS IN THIS COURT** (*Tr.* pp. 192, 186).

A FEW DATES ON THIS POINT ARE INSTRUCTIVE

The trial court handed down its decree in the "old suit" on January 9, 1907 (*Tr.* p. 94).

The appeal of the "old suit" was heard in this appellate court on May 27, 1907 (*Tr.* p. 186).

George M. Nowell, as attorney for appellants, received a copy of the record of that appeal about April, 1907 (*Tr.* p. 186).

From which it is to be seen that at the time these two letter-books were produced in April, 1907, the appeal of the "old suit" was in this court and the Transcript of Record printed and distributed to counsel.

The foregoing facts rest upon judicial records.

The statement pages 8 and 9 of appellees' brief, that the letter-books were produced "about three months subsequent to the entry of the decree in the case of *McBride v. Nowell*," **is therefore misleading, in that it entirely fails to state the controlling facts that the appeal of that suit was at that time already in this appellate court, and that the trial court for that**

reason had lost jurisdiction of the "old suit" pending disposition of the appeal of the same.

These appellants took that appeal in good faith. They could not have recalled that appeal, for they had no grounds and knew of no reason at the time why they should recall it.

At that time, April, 1907, appellants did not know that the letter-books contained any evidence that was explanatory of the transactions of June, 1896, or that would or could enable T. S. Nowell so to refresh his memory that he would be able to explain said transactions (*Tr.* p. 195).

Under such circumstances and conditions appellants had no other course open to them than to appeal from a decree which they knew was unjust, but which injustice, they subsequently discovered, they had been prevented from proving owing to the conspiracy and fraud of appellees, as alleged and set out in this bill.

As regards the statement that George M. Nowell, attorney for these appellants, was a party to case No. 1641 (Appellees' Brief, p. 9), please see page 194 of the record, wherein it is alleged that he was intervenor merely and that he took no part in the trial of that case and knew nothing of the facts that had been adduced at the trial of said suit until sometime later than October 31, 1908, upon which day he received, at Omaha, Nebraska, a copy of the record in appeal No. 1641 (*Tr.* pp. 193, 194), which allegations fully explain the whole relation of George M. Nowell

to appeal No. 1641, and which allegations should neutralize appellees' effort to connect George M. Nowell with that appeal in a closer way than the facts would justify.

Therefore, the first opportunity of knowledge these appellants had of the herein alleged conspiracy was sometime later than October 31, 1908, and the first knowledge, as a matter of fact, they did have of it was on November 6, 1908 (*Tr.* pp. 194, 195), which allegation cannot be disputed on demurrer.

The reference to pages 294, 295 of this record (Appellees' Brief, p. 9) is discussed below in this Reply Brief.

To the middle paragraph (Appellees' Brief, p. 9) should be added that the theory of appellants' complaint in this case *not only* contemplates the theory that if the contents of these letter-books had been known to appellants at the trial of the "old suit" they could have made a valid defense to the allegation of fraud in that case

BUT THAT THIS BILL ALSO CONTEMPLATES THE THEORY

of the wrongful and fraudulent carrying away and secreting by these appellees of material evidence with the specific intent and purpose to prevent T. S. Nowell from making an adequate and meritorious defense to the false allegations of fraud in the "old suit" (*Tr.* pp. 138, 139, 115-119, 134), whereby the truth and real merits of the case were kept from these appellants

and the court and an unjust and untrue decree thereby obtained (*Tr.* pp. 210, 211), which decree these appellees knew at the time was unjust and untrue (*Tr.* pp. 150, 151, 183), and to which unjust and untrue decree these appellees well knew these appellants had an adequate and meritorious defense (*Tr.* pp. 133, 134), which adequate and meritorious defense these appellees knew at the time was unknown to these appellants (*Tr.* p. 133) of which lack of knowledge these appellees took an unconscionable advantage by their unlawful act of suppressing and concealing the material evidence they had thus fraudulently obtained unbeknown to these appellants and thereby kept this good defense from all knowledge of these appellants and the court (*Tr.* pp. 150, 151, 201, 210, 211, 138, 139) although these appellees were under a legal duty to produce the concealed evidence in court (*Tr.* p. 148), which evidence if produced would have changed the entire result of the "old suit" by enabling T. S. Nowell to make his adequate and meritorious defense and by disclosing to the trial court the fictitious and fraudulent character of the "old suit" (*Tr.* p. 147. Please see p. 151, beginning at end of ninth line from top).

The discovery of this fraud was made long after the trial and appeal of the "old suit," to wit, on November 6, 1908 (answering Appellees' Brief, p. 9, middle).

It is so alleged in this bill (*Tr.* pp. 184, 187-198).

These above-described allegations are not open to dispute on a demurrer. They must be taken as true.

At the proper time they will be proved by legal and indisputable evidence.

The papers thus wrongfully taken by Wallace Hackett from the Metropolitan Storage Warehouse at Cambridge, Massachusetts, consisted in part of T. S. Nowell's private books *not because* (Appellees' Brief, p. 10) T. S. Nowell paid the stenographer's salary, paid for the books and the purchase price of the typewriting machine, etc., but *also because* they contain T. S. Nowell's private business correspondence, his private and family expenditures and the accounts of his personal pecuniary obligations (*Tr.* pp. 142, 143).

The position is taken by appellees (Brief, p. 10) that Wallace Hackett as a director of the Berners Bay Mining and Milling Company had a right thereto as such director, "because they related to matters and business" of said company and "were written by Thomas S. Nowell while he was the president of that company."

Assuming for argument's sake that this contention of appellees is correct, we submit that appellees are not in any way aided thereby, for the reason that *the foregoing contention cuts both ways.*

If Wallace Hackett as a director of the Berners Bay Company had a right to the possession of these books, then T. S. Nowell, as president, director and stockholder of the said Berners Bay Company, had an equal right to them.

This equal and co-extensive right of T. S. Nowell was denied him by means of the wrongful conspiracy and fraudulent secreting and purloining of these self-same books by these appellees, who seek to shield

themselves behind their rights as directors while fraudulently and secretly denying to T. S. Nowell his like rights as a director, and denying T. S. Nowell this right *in spite of their fiduciary duty* towards him, and in addition thereto *in spite of a legal duty to produce* in accordance with the notice given in open court to produce (*Tr.* p. 148).

These appellees violated the obligations of that fiduciary relation and that legal duty to produce, and did everything in their power to conceal and suppress said books, whereby they fraudulently deprived these appellants of their admitted right to inspect the same (*Tr.* pp. 148, 149).

If appellees admit that Wallace Hackett had a right as a director of said company to the possession of said books, then they must be taken as having admitted that T. S. Nowell, also a director of said company, had an equal right to them.

T. S. Nowell, therefore, having an equal right with Wallace Hackett to these books, it was wrongful for Hackett and the remaining appellees to conceal them from T. S. Nowell, and all the more wrongful to continue to conceal them after production of the said books had been demanded in open court (*Tr.* p. 148).

THE WRONG IS THEREFORE CLEARLY ESTABLISHED.

This wrong was committed for the express purpose of preventing T. S. Nowell from making his defense in the "old suit."

Owing to this wrong T. S. Nowell *was* prevented from making his adequate and meritorious defense.

And owing to the preventing of T. S. Nowell's defense the untrue and unjust decree was obtained.

THE CHAIN OF FACTS IS COMPLETE.

In view of this unbroken chain of facts establishing the fraud and conspiracy of these appellees what just reason can exist for refusing to grant a reopening of this case to enable the court to rectify the great wrong that it unknowingly has done these appellants?

Appellees comment (Brief, p. 11) on the allegation that during January, 1909, T. S. Nowell was stricken with a severe illness and narrowly escaped a stroke of apoplexy (*Tr.* p. 146).

Counsel for appellees urge that it occurred "almost three years after the trial" of the "old suit."

We beg to call the attention of this court to the fact that this "severe illness" was the result of the old age of T. S. Nowell, and that it resulted from incipient breaking up of the mental and physical faculties caused by old age which is known in its fully developed stage, in the legal phrase as "senile dementia."

This allegation has a direct bearing upon the allegations of the entire lack of memory of T. S. Nowell at the time of the trial of the "old suit" as showing that the lapse of time had had its effect upon his mental faculties, which approaching illness practically put him under a legal disability.

Appellees do not dispute the allegation that Willis

E. Nowell knew nothing about the transactions of June, 1896 (Appellees' Brief, p. 11), but they did not hesitate in 1906 falsely to charge him with fraud in the "old suit," although they well knew that Willis E. Nowell was absolutely innocent of any and all intent or desire to defraud the Berners Bay Company out of a farthing (*Tr.* p. 132).

At pages 11 and 12 of appellees' brief is an allegation, **inaccurately reprinted in appellees' italics**, taken from pages 199, 200 of the record.

Counsel for appellees (Brief, p. 12) take the position that this allegation is not true, as being contradicted by the record of the "old suit" and by the complaint in this case.

In the first place it is not the province of counsel to dispute the truth of this or any other allegation of this bill on this demurrer, as has been already shown.

We further contend that this allegation is not contradicted by the record of the "old suit," No. 1436, as will be duly shown at the proper time.

This contention of appellees calls for specific contradiction.

As a matter of fact the record of this appeal expressly states how little George M. Nowell had to do with the "old suit."

George M. Nowell, until about the beginning of March, 1907 (after the appeal of the "old suit"), had no connection with the "old suit" except to procure copies of certain writings at the request of his father, T. S. Nowell, and had studied the pleadings of the "old suit"

only after he had been employed as counsel for appellants in the appeal of the "old suit," No. 1436, in this court (*Tr.* pp. 245, 256).

The affidavit of George M. Nowell, sworn to on July 24, 1908, contains specific sworn statements as to the lack of knowledge George M. Nowell had of T. S. Nowell's business affairs (*Tr.* pp. 278, 279, 281).

The whole scope of appellees' brief would seem to be an attempt to dispute clear and unequivocal allegations and try this appeal on the merits upon a demurrer to the bill. We submit this cannot be permitted.

As to the fact that George M. Nowell holds as trustee the certificate for \$1,000,000 of *deferred* stock of the Berners Bay Company, and the contention by appellees that by reason of that fact said George M. Nowell was therefore cognizant of the facts and circumstances surrounding the transactions of June, 1896, we submit that this contention *is equivalent to contending* that the trustees of the Chicago University should be deemed cognizant of the corporate acts for which the Standard Oil Company was dissolved *because* they are trustees of a university that has received large pecuniary donations from Mr. John D. Rockefeller.

George M. Nowell in his affidavit deposes that he "had no knowledge of the transactions concerning the Johnson Group" (*Tr.* p. 278).

To say that because George M. Nowell holds the naked legal title of that certificate of stock in trust he

must necessarily know the facts of a transaction out of which the trust grew, is a *reductio ad absurdum*.

Appellees seek to create this erroneous impression in the face of distinct and unequivocal allegations to the contrary,

This attempt, on page 12 of appellees' brief, to call in question the truth of this specific allegation is not permissible as matter of law, and counsel for appellants beg to call attention to these repeated attempts to try this appeal on the merits, *as a substitute for a fair and square and sincere effort* to meet the legal proposition called for by the demurrer of these appellees.

The obligation to show this court wherein this bill of complaint fails to state a cause of action is consistently and constantly "sidestepped" by these appellees.

In the last paragraph (Brief, pp. 12, 13) appellees assert that these appellants admitted in their answer the making of the proposition of June 3, 1896, *but appellees fail to state* that appellants denied in the same answer that it was ever accepted as offered (*Tr.* p. 49).

That is the crucial point in the defense of T. S. Nowell which these appellees prevented T. S. Nowell from making.

These appellees by their secreting and purloining of the evidence of T. S. Nowell prevented him from showing the reason why it was not accepted as offered (*Tr.* pp. 138, 139).

Owing to the defective memory resulting from old age and the lapse of ten years T. S. Nowell was unable to remember the reason why the offer was changed (*Tr.* p. 145, 185. Please see also p. 139, middle).

Had these letter-books been shown T. S. Nowell at the trial he would have been able to remember the reason why the offer of fifteen claims had been changed (*Tr.* p. 146).

The secreting and purloining of these letter-books *did* prevent T. S. Nowell from making his meritorious defense to the "old suit" (*Tr.* pp. 138, 139).

Therefore, by their fraudulent acts and wrongful secreting and purloining of said letter-books, these appellees actually and intentionally prevented T. S. Nowell from making the meritorious defense which was foreshadowed in his answer, and which defense would have been fully and completely made had these defendants refrained from fraudulently concealing the means whereby this meritorious defense would have been disclosed to the court and made possible to T. S. Nowell, and which evidence, had it been produced as demanded, would have changed the entire result of the "old suit."

Appellees state (Brief, p. 13) that no attempt is made in this bill to refute the allegations and findings of the lower court concerning the proposition of June 3, 1896.

This is plain error on the part of learned counsel for appellees.

This bill is filled with allegations denying said allegations and findings referred to by appellees.

At pages 153 and 154 of the record will be found distinct and unequivocal allegations to the effect that the unsigned memorandum was a tentative proposition only, which was abandoned for the reason that the company was unable to take up the Nowelloption and pay the \$25,000 purchase price for the Johnson Group, and that the said unsigned typewritten memorandum did not embody and was not intended to embody the final terms of any such contract, and that the therein contained proposition had been refused by the directors of the company for the prudential reason above stated, and for the further reason that the associates and creditors of T. S. Nowell were unwilling to furnish the said purchase price of \$25,000.

At pages 120 and 121 of the record it is alleged that the Nowells, in June, 1896, had no more than an option on the Johnson Group, and that negotiations were had by T. S. Nowell with some of the directors of the Berners Bay Company regarding the transfer of said option and twelve other claims pursuant to a contemplated plan of recapitalization of said company, but that said contemplated arrangement had been abandoned by the directors prior to the stockholders' meeting of June 24, 1896, for the prudential reason that the company could not pay for the said option (*Tr.* p. 144).

At page 127 it is alleged that the proposed recapitalization of the Berners Bay Company was not induced by any promise of T. S. Nowell to convey the

Johnson Group to the said company, but that the real object that it was desired to accomplish was to prevent the bankruptcy of said company and said Nowell and avoid pecuniary losses to appellees and their associates, should said company and T. S. Nowell become insolvent and fail in 1896.

At page 144 it is alleged that the alleged contract of sale of the Johnson Group had never been made and entered into.

See bottom of page 159 for allegation of the abandonment of the plan to offer and accept the Johnson Group prior to said meeting of June 24, 1896.

See page 162 for allegation of abandonment of the proposal of June 3, 1896.

See pages 163, 164 for further allegations of the reasons why it was abandoned.

See pages 165 to 172 for complete allegations of these said reasons. See in particular pages 170 and 171 for specific and pointed reasons why the tentative proposition of June 3, 1896, was not carried out, but was modified by the Endicotts and other associates of Thomas S. Nowell. See pages 172 and 173, also 175, 176.

See page 168 for allegation showing that the Endicotts desired to avoid publicity as regards the use they had made of the funds of the Tremont National Bank.

Further citations to this record are not necessary, since the foregoing named specific and particularized allegations disprove appellees' erroneous statement

that appellants had made no attempt in this bill to refute the allegations and findings of the lower court, that the proposition of June 3, 1896, had been made to and accepted by Henry Endicott.

Answering the paragraph (Appellees' Brief, p. 13) referring to paragraph XIV of this bill, we presume that counsel for appellees is referring to paragraph XXIV (*Tr.* pp. 152-183) of this bill, which paragraph sets out with great particularity the motive that actuated appellees and their associates in purchasing the said 46 bonds and 292 shares of stock.

Answering the contention of appellees that the desire or motive to avert the financial disaster that would have overtaken them had they not averted the failure of the company and T. S. Nowell in 1896, was "not at all in conflict with the motive of acquiring further and more valuable property, including the claims in controversy," we beg to show this appellate court that Henry Endicott alleged and testified that in purchasing the eight bonds for himself he was relying upon the agreement of T. S. Nowell to convey or cause to be conveyed the Johnson Group to the Berners Bay Company (Tr. pp. 31-35, 170).

This bill alleges that this allegation and testimony of Henry Endicott were perjured.

That the promise of T. S. Nowell to convey or cause the Johnson Group to be conveyed to the Berners Bay Company was not the inducement to purchase the said 46 bonds.

That the real reason and actuating motive of the

Endicotts and their associates in so purchasing the said 46 bonds and 292 shares of stock was the imperative need of preventing the failure in 1896 of the Berners Bay Company and of T. S. Nowell.

To protect their own pockets and the Tremont National Bank to the extent of upwards of \$700,000.

To prevent damage to their reputations by public knowledge of the faithlessness of said Endicotts and others as directors of the said bank in using its funds to promote speculative gold mining enterprises (*Tr.* pp. 163-172).

IN THIS CONNECTION IT IS TO BE OBSERVED THAT

Aaron Hobart, President of the Tremont
National Bank,

Henry Endicott, Vice-President and a Director
of said bank,

William Endicott, a Director of said bank,

George Thacher, a Director of said bank,
and

D. E. Snow, Cashier of said bank,

were all interested at this time in the Berners Bay Company, either as stockholders or bondholders or both (*Tr.* pp. 173, 174, 168, 169).

If is further alleged that the recapitalization was carried out without regard to any proposed plan of acquiring the title to the Johnson Group (*Tr.* pp. 167-171), and that *it was a matter of indifference and of no importance to the Endicotts and their associates* who owned the same, whether the Berners Bay Company or the Nowells (*Tr.* pp. 169, 172, 173).

Therefore we see that *the motive was* "in conflict with the motive of acquiring further and more valuable property, including the claims in controversy" (Appellees' Brief, p. 13).

The recapitalization of the Berners Bay Company in June, 1896, had to be carried out as a matter of self-preservation of character as well as of finances to said Endicotts, Hobart, Thacher, Hackett, and others interested in said company. The averting of public disgrace and heavy pecuniary losses constituted the compelling motive.

The Johnson Group was a mere pawn on the board in that game. It was eliminated as being of no consequence, and the plan was carried out without it. *Why?* For the good reason that the respite for these appellees and their associates had to be secured, Johnson Group or no Johnson Group.

The gaining of time in order to avert public disgrace and pecuniary losses was the controlling motive. The instinct of self-preservation demanded it.

It was believed that with further time the company and T. S. Nowell would "make good" and finally liquidate their enormous indebtedness to appellees and their associates (*Tr.* pp. 171, 168, 172, 167).

Therefore the deal was carried out without the Johnson Group, and the proposition of June 3, 1896, was abandoned by all parties in interest, including the Endicotts.

The foregoing described motive which actuated these appellees at that time,—June, 1896,—was like the motive of the drowning man who grasps at a straw.

It was irresistible, overwhelming, in obedience to the mandate of nature's first law, that of self-preservation.

Regarding the last paragraph (Appellees' Brief, p. 13) we would show the court that the contracts referred to, taken with the several letters that had been discovered by F. D. Nowell about February or March, 1908 (*Tr.* pp. 187, 188, 189), disclosed to these appellants the conspiracy and fraud of which they had been the helpless victims (*Tr.* p. 193).

These contracts have a direct bearing upon the conspiracy alleged in this bill in that they are instructive as showing the relations of the parties during the years next preceding the bringing of the "old suit," and as disclosing to the court the important fact that these appellees had many times during those years entered into contractual relations with T. S. Nowell and others whereby the absolute and exclusive title of the Nowells to the Johnson Group was recognized and conceded as an undisputed fact.

These contracts are not the specific evidence which contains the defense of T. S. Nowell.

These contracts are valuable in the consideration of this case as containing corroboratory facts supporting the defense of T. S. Nowell to the false allegations of fraud in the "old suit."

These corroboratory facts have their origin and being in the acts of these appellees themselves.

The adequate and meritorious defense of T. S. Nowell is not only shown by testimony springing

from other sources, but that good defense is corroborated, confirmed and "clinched" by the acts of these appellees themselves.

This defense is thereby rendered unassailable and not open to dispute or doubt.

In this connection *it is to be remembered* that it is the inspection of the secreted and purloined letter-books that has enabled T. S. Nowell to make his defense to the "old suit" (*supra*).

And that an inspection of these said letter-books has been possible to these appellants only since September 1, 1910 (*Tr.* pp. 115-119), and that *their present complete knowledge* of this conspiracy (*Tr.* pp. 135, 137) has been had only since about September 1, 1910, or, in other words, not until about eighteen months *after the bringing of this* "new suit," *i. e.*, from March 2, 1909, to September 1, 1910.

Therefore at the time these appellants brought this "new suit," on March 2, 1909, they were in possession of only a few facts, comparatively speaking, concerning the true inwardness of the fraud and conspiracy alleged in this bill.

For this reason these said contracts furnished the completing link in the chain of evidence that enabled these appellees to discover the fraud and conspiracy alleged in this bill. (See *Tr.* p. 193.)

Many of the facts alleged in this bill did not come to appellants' knowledge until after they had been permitted in September, 1910, and thereafter, pursuant to the order of court of June 20, 1910, to inspect the

books and papers that appellees had until that time so successfully concealed from all knowledge of these appellants (*Tr.* pp. 116, 118, 119, 142, 197, 198).

This bill was verified and filed in court on February 6, 1911 (*Tr.* pp. 214, 215, 305), less than four months after these appellants had been permitted to inspect all the books and papers that had been thus secreted and purloined by these appellees (*Tr.* pp. 197, 198).

We would ask this court to take particular notice of the persistence with which these appellees carried out their conspiracy and the desperate measures and defiance of the order of court to which they resorted in the carrying out of the same, which allegations are to be found at pages 115–119 of the record.

*Where parties defy the order of a court of competent jurisdiction to produce certain books and **continue to secrete and purloin some of the books (in fact, the most important books)*** there is but one conclusion to be drawn from their conduct,—that the acts have been done with the specific intent and purpose to commit the wrong alleged in this bill (*Tr.* pp. 116, 117).

If not, what object or motive could there be in refusing to produce that which is required of them?

As regards the statement of appellees (Brief, p. 13, bottom) that it is not alleged that these said contracts were among the documents that were “abstracted and withheld by Wallace Hackett,” it will suffice to say that

It is impossible to allege every fact in this complex case.

1. The bill is already long enough.

2. These appellants have alleged only what they can prove.

3. They have no means of knowing or describing *every paper* that Wallace Hackett "abstracted and withheld."

4. These contracts are not the specific or material documents that are relied upon in this bill to show the conspiracy alleged against these appellees.

As has been already shown *these contracts are important* as being the link which completes the chain of evidence in the detection of the herein alleged fraud and conspiracy (*Tr.* p. 193), and *as corroboratory evidence* of the defense of T. S. Nowell to the "old suit."

The letter-books are the particular and specific evidence which has enabled T. S. Nowell to recollect and allege fully in this bill his defense to the "old suit."

This important fact should be constantly borne in mind.

As showing that these appellants have no means of knowing or proving what Wallace Hackett "abstracted and withheld" we would refer this court to pages 115-119, also to pages 197 and 198, of the record, wherein it is alleged *that up to about September 1, 1910, these appellants had all along thought and believed that Wallace Hackett had taken no more than two certain letter-books from the said storage warehouse,*

WHEREAS IT LATER DEVELOPED THAT HACKETT HAD REMOVED NINE SUCH LETTER-BOOKS INSTEAD OF TWO.

And as showing that the secreting and purloining of the *letter-books* is the gravamen of this complaint, and that said letter-books contain the material evidence by means of which T. S. Nowell has been able to recollect and offer his adequate and meritorious defense to the "old suit," we would call the attention of this court *in particular to pages 143-147,*

Wherein it is specifically alleged that said letter-books contain the evidence and proofs of that defense and that had T. S. Nowell been permitted at the time of the trial of the "old suit" to examine the said letter-books he would have been enabled to recollect the reason why the Johnson Group had not been offered to the Berners Bay Company in June, 1896, and make a meritorious and complete defense to the false allegations of fraud in the "old suit."

From all of which it is to be seen that *the suppression of the letter-books is the crucial matter*, and that all other writings are of a corroboratory nature, which while being of great importance to the whole controversy, are yet subordinate to the vital and controlling fact that

The secreting and purloining of the said letter-books was the specific and particular act that prevented T. S. Nowell from making his meritorious defense to the "old suit."

The foregoing disposes of the first paragraph on page 14 of appellees' brief.

As regards the second paragraph (Appellees' Brief, p. 14) we submit that these said contracts (Exhibits

“B” and C”) (*Tr.* pp. 220–240) were not pleaded or in evidence in the trial court in the “old suit,” and for that reason could not have been discussed or disposed of by the court in the trial of the “old suit,” and therefore *this appellate court* did not and could not discuss or dispose of the said contracts in the appeal of the “old suit.”

The question of acquiescence was raised by the answers in the “old suit” (*Tr.* pp. 47, 51).

Acquiescence of all parties in interest in the Nowell title to the Johnson Group was self-evident, for the reason that nearly ten years had elapsed before the “old suit” was brought (*Tr.* pp. 3, 184, 134).

Under such circumstances it was impossible for this court to discuss and dispose of these contracts in 162 Fed. 440, as appellees state (Brief, p. 14).

They did not appear in the record of the “old suit” in any way, shape or manner.

The first question argued in appellees’ brief is that of the jurisdiction of the lower court to hear and determine the “old suit” (Appellees’ Brief, pp. 15, 16).

The burden of appellees’ contention on this point is that *because* the International Trust Company appeared on March 5, 1906 (*Tr.* p. 3) in the said receivership suit, the receiver and his co-receiver had the “power” to prosecute the action in the “old suit” which was commenced on January 18, 1906 (*Tr.* p. 3).

We call particular attention to the citation from 169 Fed. 504 (Appellees' Brief, p. 16) as follows (**inaccurately reprinted in appellees' brief**):

“During the *whole time* from his appointment as receiver until the appearance of the International Trust Company, a period of nearly eight years, there was no controversy before the court.” (Italics ours.)

Now, if there was no controversy before the court during the “whole time” until the International Trust Company appeared on March 5, 1906, there could have been no controversy before the court on January 18, 1906, when the “old suit” was commenced.

The “whole time” to March 5, 1906, does not mean a part of the time.

The “whole time” means the “whole time,” and the “whole time” means up to and including March 4, 1906.

The United States Supreme Court has held that jurisdiction must exist at the commencement of the suit.

Koenigsberger v. Richmond Silver Min. Co.,
158 U. S. 49, 50.

The “old suit” was commenced on January 18, 1906.

There was no controversy before the court at that

time, January 18, 1906; therefore the receivers did not exist as a legal entity. It was as if there were no plaintiffs in the record, and therefore no action before the court (Appellants' Brief, p. 108).

The "old suit" was brought by the receivers, not by the Berners Bay Company (*Tr.* p. 4).

For this reason the trial court had no jurisdiction to hear and determine the "old suit," *i. e.*, for want of an indispensable party, the Berners Bay Mining and Milling Company.

Kendig v. Dean, 97 U. S. 423.

Swan Land & Cattle Co. v. Frank, 148 U. S. 603.

Therefore the decree in the "old suit" was void by reason of an absolute want of jurisdiction of the trial court to hear and determine the "old suit."

The statement at the bottom of page 15 of appellees' brief calls for direct and specific contradiction.

That statement is as follows:

"No objection was made in that action to the power of the receivers to sue, nor is the issue tendered with reference to this phase of the case one which could not have been tendered by the exercise of reasonable diligence at the time of the trial of that cause (the 'old suit') and the entry of the decree."

We submit a few dates on this point.

The trial of the "old suit" was begun on April 27, 1906 (*Tr.* p. 88).

The decree in the "old suit" was entered on January 9, 1907 (*Tr.* p. 94).

The appeal of the "old suit" (No. 1436 in this court) was heard on May 27, 1907 (*Tr.* p. 186).

The trial of the Berners Bay Company receivership suit (No. 1641 in this court) was had at Juneau in April, 1907 (*Tr.* p. 195).

The trial of the said receivership case was had at Juneau, Alaska, after the decree of the lower court in the "old suit" and during the pendency of the appeal thereof (*Tr.* p. 192).

(While not a matter of record in this appeal we may be permitted to state that the Transcript of Record in the appeal of the "old suit" (No. 1436) was filed in this court on February 25, 1907.)

The foregoing facts can and will be substantiated by court records.

In view of these facts, the truth of which rests upon judicial records,

HOW IS IT POSSIBLE FOR APPELLEES TO STATE IN THEIR BRIEF that the issue tendered in this case with reference to the power of the receivers to sue in the "old suit" is one which could "have been tendered by the exercise of reasonable diligence at the time of the trial of that cause (the 'old suit') and the entry of the decree"?

THE ABOVE STATED FACTS PROVE THAT IT WAS AN ABSOLUTE IMPOSSIBILITY SO TO DO.

Therefore, appellees' statement at the bottom of page 15 of their brief *is manifestly incorrect* and misleading, and not at all in accordance with the facts and court records. (See Appellants' Brief, p. 109, last paragraph.)

We further would show this court that *the appellees* in this cause who are now asserting that the receivers had "power" on January 18, 1906, to sue these appellants in the "old suit" **are the identical parties who secured the decree holding the receivership to be void.** (See Appellees' Brief, pp. 3, 4.)

These identical parties (appellees herein) cannot be permitted to "blow hot and cold."

They cannot be allowed to have the said receivership void to March 5, 1906, for one purpose in one suit,

And valid from January 18, 1906, for another purpose in another suit,

And all to gain their own selfish ends.

If the receivers had the right of action on January 18, 1906, to sue these appellants, *we would ask* why it was that the accounts of F. D. Nowell as receiver *were allowed from March 5, 1906, and not from January 18, 1906?*

If the receivership was not void on January 18, 1906, *why was it* that the court allowed the receiver's accounts from March 5, 1906, only? (See Appellees' Brief, p. 15.)

For a further discussion of this point on jurisdiction we respectfully refer this court to Appellants' Brief, pp. 101-112. We respectfully submit that it

is therein conclusively shown that the decree of the trial court in the "old suit" was absolutely void for want of jurisdiction.

Appellees' argument (Brief, pp. 16-19) consists of the contention that perjury is not a ground for setting aside a judgment of decree.

Appellants have not contended, nor are they contending, that it is when perjury is the sole ground.

An examination of pages 51 to 79 of appellants' brief, particularly at pages 61, 65, 66, will show this court that appellants are not relying upon the *perjury alone* as a ground for setting aside the decree in the "old suit," but that

Appellants are relying upon the added fraud of a conspiracy to prevent a meritorious defense by means of the secreting and purloining of the testimony of an adversary, these appellants.

That added conspiracy takes this case out of the general rule (155 Fed. 10, Appellants' Brief, p. 61) and affords the identical ground upon which this court, on the authorities cited in appellants' brief (pp. 51 to 79), should hold that the decree of the lower court sustaining the demurrer to this bill be reversed.

The fraud herein alleged was extraneous to the issues tendered in the "old suit."

See *U. S. v. Flint*, 25 Fed. Cas. No. 15,121, p. 1111, cited at page 52 of appellants' brief.

Appellees (Brief, p. 17) state that the exception in the Throckmorton Case applies to those cases

“where the defendant in the previous trial had judgment rendered against him under circumstances where he was *really* kept out of court.” (Italics ours.)

This court cannot accept as sound any such narrow, mechanical interpretation of the exceptions to the general rule laid down in the Throckmorton Case at 98 U. S. pp. 65, 66. (**Inaccurately reprinted at pages 17 and 18 of appellees’ brief.**)

The United States Supreme Court did not therein pretend or intend to enumerate all of the instances or examples under which a court of equity would feel justified to vacate a decree for fraud.

The qualifying phrase, “These and similar cases,” demonstrates that fact.

The Supreme Court says:

“these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing” (98 U. S. 66).

We have shown that there has never been a real contest in the trial or hearing of the “old suit” (*Tr.* pp. 210, 211).

This is a reason for which a new suit may be sustained to set aside and annul the former decree

And open the case for a new and a fair hearing.

**THIS APPEAL CLEARLY COMES WITHIN
THE EXCEPTIONS LAID DOWN IN THE
THROCKMORTON CASE.**

Such a narrowing down of the spirit and letter of those exceptions as contended for by appellees would open the door to a multitude of frauds to be perpetrated by means of an abuse of judicial process and powers, that is, make courts instruments of oppression rather than protectors of rights.

These appellants were the victims of a fraud which *virtually* kept them out of court, and in these enlightened days of the twentieth century it would be a reversion to the hair-splitting distinctions of the scholastic school of mediæval times to hold that the fraud alleged in this bill is not extrinsic fraud *because* the mere physical absence from court of these appellants did not happen to be a necessary ingredient of the foul conspiracy that was perpetrated upon them.

We are not obliged to rely upon analogy to support our contentions.

The above cited case of *U. S. v. Flint* specifically holds that "the secreting and purloining of the testimony of an adversary" is an extrinsic or collateral act for which equity will give relief against an unjust judgment or decree.

The Flint Case was affirmed in the Throckmorton Case.

The taking and carrying away and the secreting and purloining of the evidence of T. S. Nowell with

the intent to prevent his meritorious defense to the "old suit" by means of which acts these appellees did prevent the said defense of T. S. Nowell in the "old suit," was an extrinsic or collateral fraud for which this court should give the relief asked against the unjust decree in the "old suit." (See Appellants' Brief, p. 52 *et seq.*)

Appellees state (Brief, p. 17) as follows:

"No new issues are tendered by the present third amended bill that were not tendered in the case of McBride against Nowell, except the issue as to the power of the receivers to sue."

In the foregoing statement learned counsel for appellees falls into error.

A careful consideration of pages 64 and 92-95 of appellants' brief will demonstrate the misleading character of the above statement.

THIS BILL IS FILLED WITH ALLEGATIONS TO THE EFFECT:

That these appellees conspired to procure an unjust decree against these appellants (*Tr.* pp. 135, 150, 151, 200, 201, 210, 211).

That they secreted and purloined T. S. Nowell's books and papers in pursuance of that conspiracy (*Tr.* pp. 133, 134).

That they did so with the premeditated intent to prevent T. S. Nowell from presenting his defense to the trial court in the "old suit" (*Tr.* pp. 138, 139).

That they thereby *did* prevent the defense of T. S. Nowell in the "old suit" (*Tr.* p. 139).

That by means of their conspiracy so to prevent the defense of T. S. Nowell they secured the unjust and untrue decree in the "old suit" (*Tr.* pp. 183, 210, 211).

Surely here are some issues that were not tendered in the "old suit."

THESE ISSUES WERE NOT SET UP IN THE ANSWERS IN THE "OLD SUIT" (*Tr.* pp. 45-52) **AS STATED BY APPELLEES** (Brief, p. 8).

Further specification is unnecessary to demonstrate the untrue, misleading character of appellees' statements above referred to (Brief, pp. 8, 17).

The point raised in Appellees' Brief, p. 19, concerning the presence in court in person of the Nowells at the trial of the "old suit" has been already discussed in this Reply Brief (*supra*).

In this connection it must be remembered that the testimony of the Endicotts in the "old suit" was taken upon written interrogatories (*Tr.* pp. 160, 161) subsequently to that of T. S. Nowell (*Tr.* pp. 152, 153).

We desire here to call the attention of this court particularly to the allegations at pages 160, 161, of the record concerning the perjured testimony of Henry Endicott.

This testimony was read in open court with extended discussions interpolated by the court and counsel, confusing rather than otherwise to an old man with no knowledge of the law.

What T. S. Nowell, an old man of seventy-four, heard of the proceedings or did not hear is not to be discerned by a mere wholesale generalization that he was present in court.

The trial consumed several days, presumably. There is nothing in this record to show that T. S. Nowell was in court during the *whole trial*.

It is possible that he was not in court at the time the deposition of Henry Endicott was read in evidence. We submit that this appellate court is not the proper *forum* in which to try out such a question of fact.

We also submit that the mere physical presence of a party in court does not go to the length of placing any burden on that party for what he is unable to understand or hear. (See *Hilt v. Heimberger*, 85 N. E. 304.)

THE ALLEGATIONS OF THIS BILL FULLY SHOW:

That these appellants were utterly in the dark as to the fraudulent concealments and conspiracy of these appellees at the time of the trial and for a long time thereafter (*Tr.* pp. 136, 137, 184).

That they were deceived and misled concerning this conspiracy (*Tr.* p. 137).

THAT NOT UNTIL SOMETIME AFTER
SEPTEMBER 1, 1910, DID THEY HAVE ANY
ADEQUATE OR COMPLETE KNOWLEDGE OF

THIS SAID CONSPIRACY (*Tr.* pp. 116, 117, 118, 119, 137, 197, 198).

In the face of these strong and unequivocal allegations it is an audacious act to contend that these appellees are entitled to retain the proceeds of their wrong-doing because of the helpless and unenlightened presence of an old man in court and of the other party defendant who was as destitute of all knowledge of any facts favorable to his defense as the other and older party was oblivious of such facts owing to the infirmities of his advanced years and the lapse of ten years.

Furthermore, the very books which have enabled T. S. Nowell to recollect his defense were not produced in court at all by these appellees at the trial of the "old suit."

All the evidence that would have enabled T. S. Nowell to defend was carefully and completely suppressed by these appellees during the whole trial.

The letter-books contain the specific evidence that has enlightened T. S. Nowell concerning his defense.

These were not produced at the trial.

Although production of the same was demanded at the trial.

All the evidence produced at the trial did not enable T. S. Nowell to recollect his defense, and has not enabled him since to recollect it.

The contents of the letter-books have enabled him since to recollect his defense.

In view of the concealment by appellees at the trial of the specific evidence which has since enabled T. S. Nowell to recollect his meritorious defense, and the production by appellees of evidence only, that under no circumstances could have enlightened T. S. Nowell as to that defense, it does not lie in the mouths of these recreant directors, wrong-doers and co-conspirators to urge that because T. S. Nowell was present at the trial during which they carefully and successfully concealed this material, pertinent, vital and explanatory evidence, he should be punished for failing to make an explanation when these appellees used every subterfuge and device at their command to prevent him from making that explanation at that trial.

Answering appellees' statement (Brief, p. 19), that no motion was made for a continuance on the ground of surprise, we apprehend that motions in court must be based on some ground that is maintainable.

Where a party is groping in the dark and has no conception or suspicion even of the conspiracy of which he is the victim, and has no recollection at all of any other evidence of his defense than that which he has already submitted, and where all his other evidence has been wrongfully secreted and purloined by his opponents without his knowledge or consent, it is absurd to argue or maintain that he must make motions in court for continuances and the like.

Suppose T. S. Nowell had secured a continuance

on the ground of surprise, what would it have availed him?

All the evidence of which he had had any recollection had been already submitted in evidence.

All his other evidence had been wrongfully carried away and concealed by these appellees, without his knowledge or consent.

There was not a scrap of paper to be found to establish his defense.

A search from Boston to Alaska would have unearthed nothing. It was all in the wrongful possession of these appellees.

Equity will not require a party to do a nugatory act.

The foregoing is a sufficient answer to appellees' said contention.

Answering appellees' statement (Brief, p. 19) as follows:

“no attempt [was] made *in any way* to secure evidence to rebut the evidence offered by the plaintiffs in that case.” (Italics ours.)

This statement is not in accord with the facts and the record of this appeal.

We cannot here quote the record of the “old suit,” but at the proper time it will be shown that the above statement is not in accord with that record.

Counsel for appellees are unjustly seeking to create an impression

of an entire absence of diligence by appellants in the "old suit."

Thomas S. Nowell before trial of the "old suit" procured all the evidence of which he had any recollection and offered it in evidence at the trial of that suit.

At page 245 of this record is the following allegation:

"That up to and until about the beginning of March, the only connection said George M. Nowell has had therewith (the 'old suit') was to get copies of certain writings at the request of his father, Thomas S. Nowell, one of the appellants herein."

That was March, 1907.

That allegation means that George M. Nowell got copies of the writings that T. S. Nowell offered in evidence in the "old suit."

Those writings constituted all of the evidence pertinent to his defense of which T. S. Nowell had any recollection at the time, consisting of the corporate records of the Berners Bay Company (*Tr.* p. 139).

(The foregoing disposes also of the last paragraph, Appellees' Brief, p. 19.)

We are therefore reasoning around the circle and invariably are forced back to the proposition that

these appellees rendered all acts of T. S. Nowell nugatory by reason of the wrongful secreting and purloining of his evidence, which wrong they wilfully perpetrated upon their unsuspecting and trusting associate and co-director.

There was nothing, not even a suspicion upon which to base a motion for a continuance or for a new trial, for the reasons hereinbefore set out.

Why then should T. S. Nowell be punished for not moving the court for a continuance or new trial when he had not the slightest suspicion of a justification for such proceeding, or for not hunting for evidence of which he had not the slightest recollection (in addition to the evidence he did recollect), where such acts, had he taken them had been, in advance, rendered nugatory by the wrongful taking and carrying away and secreting and purloining by these appellees of all of that other evidence the existence of which he had not the slightest recollection?

To punish a party under such circumstances at the instance of the wrong-doers themselves is a proposition that is abhorrent to all principles of justice.

Answering middle paragraph, page 18 of appellees' brief, we respectfully refer this court to pages 47 to 79 of appellants' brief.

As regards the question of diligence raised by appellees' in their brief at pages 19 to 24 we would respectfully refer this court to the multitude of allegations (possibly amounting to surplusage) in this bill to the effect

That owing to the lapse of ten years, the infirmities of old age, the death of a material and the only witness available to the Nowells, T. S. Nowell had absolutely no recollection of any evidence at all, **EXCEPT THE CORPORATE RECORDS**, that was pertinent to or explanatory of the issues raised in the "old suit" (*Tr.* pp. 185, 131, 132, 138, 139).

Willis E. Nowell never did know anything about the facts of the transactions of June, 1896, did not know of the existence of any pertinent evidence and never had any knowledge of T. S. Nowell's business or business books or papers (*Tr.* pp. 184, 185).

Therefore at the time of the trial of the "old suit" there was not a person in the land of the living connected with these appellants who had any knowledge of the existence of any pertinent evidence except the corporate records (*Tr.* pp. 185, 186, 139).

Now, please consider the foregoing state of facts in connection with the facts that these appellees had wrongfully taken *all* of the other evidence pertinent to the case into their exclusive possession, unbeknown to T. S. Nowell, and were secreting and purloining the same.

In the face of these astonishing facts these appellees have the effrontery to argue in extenuation of their wrong that because T. S. Nowell did not hunt for something that he did not know was in existence, and because T. S. Nowell did not hunt for something that these appellees had previously carried away and concealed and put it out of the power of T. S. Nowell

to find or discover, that then, and in that case, T. S. Nowell must be held chargeable with a lack of diligence whereby these appellees shall be entitled to retain the profits of the gross injustice and fraud they have so skillfully and wickedly practised upon him and upon the court.

That is to punish innocent T. S. Nowell for the wicked acts of these conspirators.

A most beautiful doctrine!

In other words, the victim of one wrong must bear the burden of still another wrong when he appeals to a court of equity to protect him against the downright wickedness of the scheme that is alleged in this bill.

To allow these wrong-doers to shield themselves behind such a monstrous proposition or doctrine would be to turn a court of equity into an instrument of injustice and oppression.

We have already answered Appellees' Brief, page 20, concerning George M. Nowell's connection with the "old suit" and his lack of knowledge of T. S. Nowell's business (*supra*).

Appellees incorrectly state that no request for the production of books, papers or documents was refused to the appellants (Brief, p. 20).

That statement also calls for specific contradiction.

At pages 148, 149 of the record will be found allegations concerning the demand in open court to produce. The books and papers were not produced as demanded.

At page 119 of the record it is alleged that Hackett, upon demand being made upon him for the letter-books, denied all recollection of having taken any of T. S. Nowell's books from the storage warehouse. See also page 196 of the record, also page 118.

At pages 141, 142, the bill alleges that Hackett and his co-conspirators have wrongfully withheld these books from these appellants, and have concealed from them all knowledge of their whereabouts, when these appellants have sought to learn from said Hackett whence he had taken them and to whom he had delivered them, and that said Hackett has at all times refused to inform these appellants where these books were to be found.

Yet these appellees state that no request for the production of these books has been refused to the appellants.

We also submit that references (Appellees' Brief, p. 20) to the record of No. 1436 are not permissible, and that it is an attempt to try this case on the merits in this appellate court on a demurrer to a bill traversing the record cited from.

Answering Appellees' Brief, p. 21, we have many times stated that

AT THE TIME OF THE DISCOVERY, IN APRIL, 1907, OF THE TAKING AND CARRYING AWAY OF THE SAID LETTER-BOOKS, THE APPEAL OF THE "OLD SUIT" WAS ALREADY PENDING IN THIS COURT OF APPEALS, AND THAT

At that time (April, 1907) these appellants did not know that the said letter-books contain any evi-

dence pertaining to the transaction of June, 1896 (*Tr.* pp. 195, 196).

The negotiations of June, 1896, were almost entirely verbal, owing to the close relations at that time existing between T. S. Nowell, the directors and his other associates (*Tr.* p. 124), which fact increased the difficulty after ten years, of remembering and perceiving the connection of the letter-books with those negotiations.

Old age and the lapse of ten years did the rest.

Answering appellees' reference to Section 93 of the Alaska Code (Brief, p. 21), we repeat that at the time of the trial of the "old suit," and until November 6, 1908, these appellants knew of no ground upon which they could move the trial court to give them relief from the decree in the "old suit" (*supra*).*

The fact that these appellees were under a duty to produce in accordance with the notice to produce given in open court (*Tr.* p. 148) disposes of two paragraphs on pages 10 and 22 respectively of appellees' brief.

The proposition contended for in those two paragraphs goes to the length of asserting

That Wallace Hackett as a director of the Berners Bay Company had a right to the possession of those books, and that this possessory right of Hackett included the right to deny to T. S. Nowell, also a director and president as well of said company, the right to the possession and inspection of said books.

~~*Reference to the chapter being omitted we have been unable to refer to the statute itself.~~

If Hackett as a director had a right to the possession of those books, then T. S. Nowell as a director *and president* of said company assuredly had an equal right to the possession and inspection of them. (See Appellees' Brief, p. 10, middle of page.)

It is to be noticed that appellees here admit that Wallace Hackett took the books in question and "*kept them.*" They further admit that they "used such of those books and papers as they (appellees) deemed material to the issues in the original case and introduced the same in evidence." (Appellees' Brief, p. 22).

That is to say, they used "such of those books and papers as they deemed material" to the establishing of their false case in court.

Appellees' argument (Brief, p. 22) is equivalent to contending that this duty to themselves entirely absolved them from their duty to produce these books and papers in open court as demanded (*Tr.* pp. 148, 149), and further absolved them from their duty arising out of their fiduciary relation to T. S. Nowell, and also from their duty not to take the unconscionable advantage of T. S. Nowell which they were conspiring and confederating together to take of him.

We earnestly ask this court to consider the above state of admitted facts in connection with the following facts presented by this bill.

Appellants allege:

That it was T. S. Nowell's personal books that Hackett took away and concealed (*Tr.* pp. 142, 143).

That in case these said books *are* the property of the

Berners Bay Company, T. S. Nowell as a director, president and stockholder of said company had a right to the inspection of the same (*Tr.* pp. 148, 149, 27).

That these books contain the evidence and proofs of the innocence of T. S. Nowell of the charges of fraud in the "old suit" (*Tr.* pp. 146, 147, 143, 144).

That appellees suppressed and concealed these books containing the evidence of this defense, although given notice to produce (*Tr.* pp. 148, 142).

That appellees had complete knowledge of these facts (*Tr.* p. 134).

That they thereby prevented T. S. Nowell from making his meritorious defense to the fictitious suit of these appellees (*Tr.* pp. 138, 139).

That they prevented this defense knowingly and with premeditated intent (*Tr.* pp. 138, 139).

That they took this unconscionable advantage and secured the unjust and untrue decree herein complained of (*Tr.* pp. 134, 183, 210, 211).

That the defense alleged in this bill is a complete defense, to wit:

- a. That the Johnson Group has never been offered to or accepted by the Berners Bay Company (*Tr.* pp. 144, 267, last paragraph).
- b. That the plan to offer the Johnson Group to the company, as proposed in the unsigned memorandum of June 3, 1896, had been abandoned prior to the stockholders' meeting of June 24, 1896 (*Tr.* pp. 144, 153, 154).

- c. That the records of the meeting of June 24, 1896, are true (*Tr.* pp. 144, 176, 149, 150).
- d. That the said records have never been fraudulently altered or changed (*Tr.* pp. 144, 149, 150).
- e. That the contract alleged and set up in the "old suit" has never been entered into or made (*Tr.* pp. 144, 153, 154).

Now, please consider the further fact that the production of these books was demanded in open court by these appellants (*Tr.* p. 148) but not produced.

What answer have these appellees made to the above state of facts?

This is their answer:

That Wallace Hackett as a director had a right to these books (*Appellees' Brief*, p. 10), and that they were under no duty to reveal this evidence to T. S. Nowell, Hackett's co-director (*Brief*, p. 22).

Is that an adequate answer to a bill charging the grievous wrongs and iniquitous conspiracy that are alleged in this bill?

The Supreme Court of the United States has given the appropriate and just answer to appellees' proposition.

We beg to cite the case of

Crosby v. Buchanan, 90 U.S. (23 Wall.) 420.

In that case one Vint claimed certain real property, and after having waited until the parties to the

transaction were dead wilfully concealed from the ignorant heirs of the deceased contracting parties his (Vint's) contract for a reconveyance of the said property and the receipt which belonged to it. The court ordered the cancellation of the deed to Vint.

Mr. Chief Justice Waite, speaking for the court, at page 457, said:

“When, therefore, Vint came into court and asserted his absolute title as against the ignorant heirs of these deceased contracting parties, and wilfully concealed his contract for a reconveyance and the receipt which belonged to it, he came with unclean hands and must suffer the consequences. **He does not excuse himself for this attempted fraud by pleading defect of memory, but claims boldly that he was not required to tell all he knew; that his duty was at an end when, selecting his own facts, he presented his own case.** It is true he had the right to select that way of coming into court, but having deliberately made his selection he ought not to be surprised if he finds that he is received with suspicion. Honesty of purpose prompts frankness of statement. Concealment is indicative of fraud.”

At. p. 458:

“By his own admissions in commencing his proceedings against them he concealed the truth. He thus in effect confesses that he relied to some extent for his success upon their ignorance. **After years of groping in**

the dark, they were able to confront him with the facts and, as we think, to defeat the case he has attempted to make against them.” (Bold type ours.)

At p. 454:

“In a court of conscience deliberate concealment is equivalent to deliberate falsehood.”

No fiduciary relation existed in the above-cited case.

The foregoing doctrine announced by the Supreme Court of the United States in express terms condemns the identical proposition contended for by appellees in their brief at pages 10 and 22, above cited.

The citation from 23 Cyc., p. 1026 (Appellees' Brief, p. 22, **inaccurately reprinted in appellees' brief**), does not contemplate or include the right to commit a legal wrong upon one's adversary in order to win.

The context of that citation from Cyc., **WHICH COUNSEL FOR APPELLEES OMIT**, supports appellants' proposition, as follows:

“An unjust judgment obtained by means of deceit, artifice, or concealment may be enjoined in equity, there being no adequate remedy against it at law.”

A party oversteps the line dividing legal frauds from conduct that is merely reprehensible from a moral standpoint,

when he resorts to false testimony, or to some trick or artifice, with a view of deceiving the court, and thereby obtaining a judgment to which he is not entitled.

Appellees' citation from 6 Pomeroy Eq. Jur., Sec. 654 (Brief, pp. 22, 23), supports appellants' contentions because these appellees were under a duty to disclose, and there was an intentional concealment of a material and controlling fact for the purpose of misleading and taking an undue advantage of the opposite party.

If ever litigants took an unconscionable and undue advantage of the opposite party it must be conceded that these appellees took that undue advantage of these appellants at the time they concocted and carried out their conspiracy in the "old suit."

Answering pages 23 and 24 of appellees' brief we call attention to preceding pages of this Reply Brief wherein we treat of the contracts mentioned, also to preceding pages wherein we treat of the absolute lack of knowledge of T. S. Nowell of all evidence that was pertinent to the issues of the "old suit," except the corporate records (*Tr.* p. 139), copies of which he introduced in evidence.

These contracts, as before stated, are used in this record to corroborate the defense of T. S. Nowell. *They are not* the specific evidence upon which this bill is based and for the concealment of which the allegations of "secreting and purloining" the evidence of T. S. Nowell are made in this bill.

The letter-books are the material evidence that was secreted and purloined.

These contracts completed the chain of evidence

which enabled these appellants to discover the fraud and conspiracy alleged in this bill, but they are secondary in importance to the said letter-books, accessory to this suit in the nature of corroboratory evidence of T. S. Nowell's defense which was prevented by the secreting and purloining of the letter-books in question and not of these contracts.

This point should be clearly kept in mind.

This brings us to the last section of appellees' brief, pages 24 to 35.

The sum and substance of the argument therein contained consists of the contention that the old decree was right and should, therefore, not be disturbed.

Appellees argue that even if there was no fraud, as alleged in the former suit, there was the alleged contract which should be enforced. We have shown that, should the element of fraud be eliminated, the "old suit" was stale and without equity (*Moore v. Nickey*, 133 Fed. 289).

But this line of argument totally ignores the facts that this bill not only alleges facts which show that the fraud alleged in the "old suit" was a fictitious charge, trumped up by these conspirators, but that this bill further alleges that the contract set up in the "old suit" and contended for in appellees' brief never did exist, the proposition contained in the unsigned memorandum of June 3, 1896, having been a tentative one only, which proposition was refused by the direc-

tors and their associates and not carried out, for the reason that the company, the directors and T. S. Nowell's associates could not and would not put up the \$25,000 purchase money for the Johnson Group upon which the Nowells in June, 1896, had only an option.

This is the state of facts that the discovery of these secreted letter-books has enabled T. S. Nowell to recollect and show the court.

This state of facts conclusively demonstrates the injustice of the decree in the "old suit." It was based upon false premises due to a fraud practised upon the court and upon these appellants.

Therefore, all argument in support of the former decree is directed to the upholding of a wrong decree that has no good reason for its existence, a judicial monstrosity owing to its inherent yet unconscious injustice.

The facts alleged in this bill show that the fraud was never committed as alleged in the "old suit," and that the contract therein set up was not the contract that was ultimately agreed upon.

It was not agreed upon because the associates of T. S. Nowell had other and controlling reasons for carrying out the recapitalization of the Berners Bay Company than the mere acquisition of the Johnson Group.

The knowledge of all these facts was kept from the court and from these appellants by means of the wrongful secreting and purloining of the evidence — letter-books — of these appellants.

The production of that concealed and suppressed evidence in 1906 would have changed the result of the "old suit."

Why then should not the production of this evidence after it has been wrung fairly by force from these conspirators be equally as potent today in changing the result of the "old suit" as it would have been in 1906?

If a fraud is committed by one individual upon another the courts are eager to rectify the wrong. That principle was the whole foundation of the "old suit."

This being so, a court should be all the more eager to correct its own unintentional wrong when the court has been deceived into doing that wrong by means of a conspiracy to conceal and prevent a meritorious defense and thereby turn the court into an instrument by which the property of the innocent party is unjustly taken from him for the benefit of the fraudulent party.

Reference to the decree and findings in the "old suit" should be regarded as not permissible and irrelevant, for the good reason that that decree and those findings are untrue owing to the wrongful acts of these appellees. Then again, it is not permissible as a matter of law to argue matters extraneous to this bill to which these appellees have demurred.

The whole italicized paragraph of appellees (Brief, pp. 28, 29) is untenable, because it is based upon the fallacy that the decree in the "old case" was right when it was wrong, because of the consummated conspiracy of these appellees.

There was no such contract made.

The full purchase price contemplated was for the twelve claims actually offered to and accepted by the Berners Bay Company.

The full purchase price was \$1,000,000 of deferred stock that could not receive a dividend until all the remaining stock had received 100% in dividends.

The Nowells were under no obligation or duty to return the consideration or any part of it, for they received it in payment for the twelve claims in accordance with the terms of the contract finally agreed upon by the parties in interest.

The principal value did not lay in the three claims in controversy, as will be shown at the proper time.

The Nowells were under no duty to reimburse Endicott and his associates in the sum of \$42,000, for the reason that the contract as agreed upon and carried out by the parties was a different one from that tentatively proposed in the document of June 3, 1896, which document was ultimately abandoned by the directors of the company and their associates for the reasons already given.

Endicott and his associates did not purchase the said 46 bonds and 292 shares of stock, relying upon T. S. Nowell's promise to convey the Johnson Group to the Berners Bay Company, but they bought them as a temporary expedient in order to avert the threatened financial disaster and public disgrace.

They intended to sell them later on and keep the 292 shares of stock as their profit.

The whole italicized paragraph (Appellees' Brief, pp. 28, 29) is a commingling of erroneous conclusions based upon false premises, misquotations of this record and citations to extraneous matter.

Answering Appellees' Brief, pp. 25, 28, we submit that appellees' statement that only the agents of Nowell were present at the meeting of June 24, 1896,

is entirely outside of this record, and is not true.

It is outside of any record in this litigation.

W. M. Payson was not T. S. Nowell's agent or attorney. He was counsel for the Berners Bay Company, *and that only*.

C. O. Barrows was the clerk of that company, *and no more*.

Arthur L. Nowell was the assistant treasurer and assistant clerk of that company with the consent of all parties in interest, including appellees.

Arthur L. Nowell is dead and unable to defend himself against the imputations of counsel for appellees.

The affidavits, however, of Mr. Payson and Mr. Barrows surely carry as much weight as the unsupported and prejudiced innuendo of counsel for appellees (*Tr.* pp. 265-276).

If Mr. Payson is the rascal that counsel for appellees would have this court believe, then Chief Justice Peters and Judges Haskell, Dodge and Hale are very much mistaken men (*Tr.* pp. 273-275).

The end of the last paragraph (Appellees' Brief, p. 28) is so untrue and so contrary to the facts alleged in this bill as to be beneath our notice.

Answering the middle paragraph (Appellees' Brief, p. 29), we submit that the opinion of the lower court in the "old suit" is not a part of the record in this appeal and cannot be referred to for the reasons already stated.

The "cant" and insincerity of the last paragraph (Appellees' Brief, p. 29) is patent. In case these appellees are actuated by such a lofty sense of justice let them give us the opportunity to prove the allegations in this bill and demonstrate whether or not the case made out by this bill is so inequitable as they attempt to make out. If it is they will not suffer.

Answering the paragraph at bottom of page 29 and top of page 30 (Appellees' Brief), it is not necessary to attack the finding that the Endicotts parted with \$42,000.

They parted with that \$42,000 under circumstances that were satisfactory to them and in accordance with the terms of the contract *finally* agreed upon (*Tr.* pp. 154, 155). The *motive* they had in so doing is not a conclusion, as stated by appellees (Brief, p. 30), for the multitude of facts explaining and elucidating that motive are alleged with great profuseness (*Tr.* pp. 162-175).

The facts and circumstances out of which that motive had its birth and being are alleged with such particularity that the motive is necessarily inferred from the facts stated.

The motive alleged in this bill is not a different motive than that pleaded in the "old suit" (Appellees' Brief, p. 30).

It is the identical motive that would have been pleaded and proved in the "old suit" had not these appellees fraudulently prevented it from being pleaded and proved by means of their wrongful secreting and purloining of the evidence of these appellants.

The long paragraph (Appellees' Brief, p. 30) is a travesty upon fair statement.

The facts alleged in this bill are so distorted and absolutely misstated and misinterpreted in this paragraph as to be comical were it not for the fact that this gross misrepresentation is made by an attorney in a brief to be submitted to a court of justice. In that aspect it becomes tragically serious.

This court will please note that this paragraph contains no references to the record.

The citation from the opinion of the lower court (Appellees' Brief, pp. 31, 32) is not in any way pleaded in this record, and for that reason reference to the same is not permissible on this demurrer, under the rulings of the United States Supreme Court.

As regards the excerpts from letters printed at pages 32 and 33, Appellees' Brief, *we will presently content ourselves with calling the attention of this court to the unmistakable and important facts that these identical extracts show beyond all question of doubt that T. S. Nowell did not commit the fraud with which he was charged in the "old suit," and that the Johnson Group had not been offered to and accepted by the Berners Bay Company as alleged in the "old suit" (Tr. pp. 15, 16).*

Those facts alone demonstrate that the decree in the "old suit" was untrue and unjust.

The facts and circumstances surrounding the transaction which will enable a court properly and correctly to construe the language of these letters, and other letters of T. S. Nowell already in evidence in the depositions that have already been taken *in perpetuam* (*Tr.* pp. 208, 209), will be shown at the appropriate time.

Counsel for appellees (Brief, p. 33, middle paragraph) cannot seem to get the right idea of the transaction of June, 1896, as alleged in this bill.

The \$42,000 and the \$1,000,000 of deferred stock were not paid for the fifteen claims.

The \$42,000 was raised to purchase the forty-six bonds to get rid of the disturbing element that was standing in the way of the proposed recapitalization of the company, and the \$1,000,000 of deferred stock was issued to the Nowells for the twelve claims that were finally agreed upon by all parties in interest.

We regret that we are obliged to repeat so much.

Page 34 of appellees' brief is a further travesty upon fair, judicial statement.

T. S. Nowell never agreed to convey to the Berners Bay Company the Nowell option on the Johnson Group plus \$25,000. He agreed to convey his option. That was all (*Tr.* pp. 120, 154).

The Berners Bay Company was unable to pay for it (*Tr.* p. 154).

T. S. Nowell was involved in the Berners Bay

Company promotion to the extent of \$300,000 to \$400 – 000 of liabilities, which he had assumed for the benefit of said company (*Tr.* p. 131).

His associates, including the Tremont National Bank, were involved to the extent of more than \$700,– 000 (*Tr.* p. 166).

The aggregate indebtedness thus amounted to more than \$1,000,000.

The Nowell option was therefore refused by all parties in interest. They could not pay for it.

But the company had to be recapitalized to avoid a foreclosure, to save the bank, themselves and their reputations.

The Nowells owned twelve claims in fee simple which they could convey.

The conveyance of these claims justified the payment of \$1,000,000 of deferred stock and an increase in the mortgage debt.

The recapitalization had to be carried out. The alternative was heavy pecuniary losses and the possibility of public disgrace.

It was sink or swim. The parties in interest decided to try to swim.

The recapitalization was carried out, the offer of twelve claims accepted, and the \$1,000,000 of deferred stock issued for the same.

This deferred stock has never been worth a dollar.

T. S. Nowell transferred twelve valuable claims to the company, and took the deferred stock.

When the company finally did go to the wall his

associates took the properties plus the twelve valuable claims.

While the Nowells retained the worthless deferred stock, and T. S. Nowell remained the unsecured creditor of the company to the extent of about \$400,000.

It would appear that T. S. Nowell "came out at the small end of the horn."

The foregoing statement disposes of the sarcastic and irrelevant as well as impertinent reference to T. S. Nowell at page 35 of appellees' brief.

The Nowells in 1896 had an option on the Johnson Group. They believed it to be a valuable property. They did not want to lose the benefit of that option. They finally succeeded in paying for the Johnson Group, but it took them two and one-half years to do it (*Tr.* p. 211).

In 1902 the Nowells patented the Johnson Group (*Tr.* p. 103) with the knowledge and consent of the Endicotts, Hackett and Fairchild (*Tr.* p. 212).

On several occasions it has been included in deals to sell the Berners Bay Company properties, and the Nowells have been assured of a large purchase price for it. (See Exhibits "B" and "C," *Tr.* pp. 220-240.)

All with the knowledge and acquiescence of the Endicotts and all others in interest (*Tr.* pp. 179, 180).

Finally, when these appellees had cast T. S. Nowell aside as useless to them (*Tr.* p. 173), as one casts aside an old shoe, they attacked him in the courts, besmirched his good name, and by means of a foul conspiracy and fraud, had the Johnson Group

unjustly taken from him and his son by means of an untrue and unjust decree.

Paraphrasing appellees' words (Brief, p. 35): "A most excellent idea of the manner in which Mr. Nowell was treated by his backers may be obtained from this record."

THE REAL AND WHOLE STORY IS TOLD FOR THE FIRST TIME IN THIS BILL.

In answer to appellees' suggestion, we should be most happy for this court to read Exhibit "D" (*Tr.* pp. 240-243), not once, but several times, since it proves some of our allegations (*Tr.* pp. 129, 166, 172, 178, 179).

And we would respectfully ask the court *to dwell with particular attention* upon the following sentence contained in that Endicott letter:

"If the property is what you believe it to be WHAT YOU CAN RECEIVE for the Johnson will be quite a fortune in itself" (*Tr.* p. 242).

If the Johnson Group belonged to the Berners Bay Company, as claimed in the "old suit," why should T. S. Nowell receive "quite a fortune in itself" for it? *Quære?*

The date of that Endicott letter is instructive:

JULY 18, 1905

That letter was written six months to a day before the "old suit" was brought against these appellants (*Tr.* p. 3).

It was written more than nine years after the transaction complained of in the “old suit” (*Tr.* pp. 12-16).

That letter shows what pecuniary inducements from the Endicotts T. S. Nowell refused rather than aid these appellees in their fraudulent scheme and conspiracy (*Tr.* pp. 129, 104).

There were other creditors to be protected than these appellees, and T. S. Nowell, actuated by a sense of duty to *all the creditors*, refused these inducements and declined to become a party to a scheme which he considered unfair and unsafe to those creditors (*Tr.* pp. 104, 105, 106).

T. S. Nowell knew from actual experience that the sum of \$150,000 was totally inadequate to make a success of the reorganized company (*Tr.* pp. 104, 105).

As a matter of fact the charges and disbursements of the said reorganization committee did actually amount to more than \$115,000 out of the said \$150,000 (*Tr.* pp. 101, 102).

That left a remainder of less than \$35,000 with which to prosecute a mining business in Alaska consisting of about forty-five or fifty mining claims (*Tr.* p. 96).

How long would it have been, under such circumstances, before the just creditors of the Berners Bay Company would have found themselves “out in the cold” by the foreclosure of the mortgage of the new

company? (In this particular connection we respectfully ask this court to consider pages 99 to 108, inclusive, of this record.)

These simple and indisputable facts constitute T. S. Nowell's justification for refusing to become a party to a scheme which he believed to be inadequate and unsafe to his associates, even if carried out in the best of good faith.

But he had good and satisfactory reason to believe that the proposed scheme was a fraudulent one (*Tr.* pp. 102, 104).

We respectfully refer this court also to Exhibit "A" (*Tr.* pp. 218-220), in which William Endicott writes to T. S. Nowell, under date of September 13, 1900, as follows:

"If we hear from you that you will put in the Johnson we shall not hesitate to trade" (*Tr.* p. 219).

That letter was written more than four years after the transaction complained of in the "old suit."

If the Nowells did not own the Johnson Group in 1900, why should the Endicotts wait on the decision of T. S. Nowell "to put in the Johnson" or not to put it in? Again *Quære?*

What answer can these appellees offer to such evidence from out of their own mouths of their perjury, fraud and conspiracy?

After having thus exhaustively discussed *all the points* contended for in appellees' brief, we beg to submit the following concise examination of the various aspects of this very complicated case.

In the preamble of the order sustaining the demurrer in part, the lower court refers to certain printed records, etc., presented by the attorneys for defendants, and further states that defendants asked the court to take particular notice of certain pages, records, etc., all done over the objection of the plaintiffs, with an exception allowed. But there is no suggestion in the record indicating that any consideration was given to the outside matter. This matter is again referred to at large in appellees' brief, as well as in the oral argument made to the court. Much stress was laid upon this extrinsic matter by learned counsel.

This extraneous matter cannot be considered in this argument at all, or made a part of the bill by reference as made or otherwise, as is shown by the cases cited on pages 44-47 of appellants' brief. But may we again call attention particularly to:

Pacific R. R. of Mo. v. Missouri Pac. Ry. Co., 111 U. S. 518.

Stewart v. Masterson, 131 U. S. 151, 158.

The rule is well founded in reason, and is based upon the highest principles of justice and equity. For this argument, as the cited authorities unanimously show, the third amended bill of complaint must be

taken as absolutely true. *More, it cannot be burdened by outside matters.* Its object is to try particularly an issue which was tried by the court on what amounted to an *ex parte* presentation, caused solely by the wrongful acts of defendants, while plaintiffs were without fault. Therefore, to read into the complaint evidence received and orders and pleadings made and filed in the "old suit," would amount to a trial on the merits here, without receiving all of the proof otherwise, because of continuing the suppression.

It seems to us that when this illustration is made, the reason for the rule so ably announced and defended by the Supreme Court becomes more apparent.

To hold or contend otherwise is to say that a cause shall be determined upon hearing one side only. This brought down to its final analysis is the essence of appellees' argument. Such a position and conclusion is subversive of all rights.

The argument in appellees' brief practically concedes that appellants should succeed, were it not for the fact that counsel tries to read into the bill that which has no right there, and more, shows only one side of a controversy.

A careful analysis of the authorities relied on by appellees shows that there is no contention between the parties as to the rule of law governing in this controversy. The citations amount to an affirmance of the position which we have taken. The doctrine in Throckmorton Case is determinative of this whole issue, and resolves the question in favor of the appellants.

We readily understand why the lower court sustained the demurrer. There were many controverted questions of law to be settled, and acting as the lower court often does, it is best to resolve the question in the way that shall allow the settling of these different questions with the least possible expense. The lower court was in doubt, and therefore wanted this court to lay down the rules so that it would not require an expensive record to take before the court in the future, if any party desired to appeal. While no part of the record, we take the liberty of saying that the lower court did say that it was much in doubt when considering the law, and concluded it best to grant the demurrer, so that by an inexpensive record the doubts might be removed, in a decision of this or the Supreme Court.

Counsel for appellees take the position that to sustain the appeal would in effect be requiring their clients to furnish testimony with which to defeat themselves, and cites Black, Pomeroy and other texts. Grant, if desired, for argument's sake, a rule so harsh that a party to a suit knowing of testimony that might defeat him, but does not call attention to or disclose it or permit its disclosure, and yet obtains a decree in his favor, may have that decree sustained after his conduct has been shown.

But that rule of law, should such exist, has no application to the facts here pleaded.

We do not ask these people to furnish us the undisclosed testimony. We ask that they return

documents, etc., which they obtained by misrepresentations and suppressed without right of law, and when their wrongful act (we could characterize it by a much harsher word and be within the law and truth) was discovered refused to furnish in open court when demand was made, and not only took that position, but misled counsel and court by producing a portion of the situation and suppressing the remainder. This in open court is an unheard of course, compounding the wrong.

In other words, the object of this bill is to obtain that which they have fraudulently purloined and suppressed, and which act was not known and could not be known until after the trial and appeal in the "old suit" was had.

Criticism was made in the argument, because all of the documents relied upon were not set out *in extenso*. The substance was pleaded, which was all that the best rules of pleading require. To have set them out in full would have added probably another five hundred pages to the record.

It seems unnecessary to cite authority upon this well-settled question, but we will call attention to

Fletcher's Equity Pleading, p. 132.

The cases there cited fully sustain the text. We call special attention to the opinion from the Mississippi Case by the late Chancellor Ellett, quoted from in the foot note.

Fifty years ago it was considered unskillful plead-

ing ever to set out instruments in full, either in the bill proper or as an exhibit, but resort thereto was more or less indulged. Later and in the days of stenographers the rule has been relaxed, until now it is common to set up a full copy of an instrument to be relied upon, rather than its substance. This probably finds its reason in the overwork or lack of industry of the pleader, because he may refer to an instrument and turn it over to a stenographer to copy, all of which saves valuable time of the pleader, but is wasteful of the more valuable time of the court.

Therefore, in this bill, the substance and not the copies themselves of the suppressed letters, so skillfully condemned by counsel for appellees, were pleaded.

We are sure this court will *commend* rather than *condemn* this course.

The good faith and honesty of the appellants is very severely attacked in appellees' brief, concerning the Johnson Group, about which really the whole controversy is waged. This course by appellees is and was to be expected.

We admit that when a case has been heard and a decree entered finding an old man (Mr. T. S. Nowell) guilty of fraud, a very strong showing must be made to allow a new hearing.

Again, under all the circumstances, we are not at all surprised to see opposing counsel controlled as much by prejudice as by reason. It is but human so to act.

Coupled with the further fact that at first blush, as contended by appellees, it seems that the whole matter has been settled in the three cases referred to

on page 4 of appellees' brief, we see how naturally one falls into the position of thinking all is ended.

Courts even in such instances might indulge in an unconscious prejudice. Therefore this condition has all along confronted us. We are, however, confident that a careful reading of the bill will dislodge all prejudice and convince any one that a good cause is stated.

The tentative agreement, as the pleading well shows, included the Johnson Group, and required that the Endicott crowd should pay the amount due Johnson, to wit, the \$25,000, before the option expired. They failed in this, but if they had done that the Johnson Group would have been included, that is, taking over the whole Nowell interest. Mr. T. S. Nowell had put into the venture over \$300,000. The Endicott crowd in various ways became responsible for a similar amount, and the Boston bank had on endorsed paper advanced a similar amount. This money had been expended in acquiring and developing the thirty odd claims, not including the Johnson Group. Therefore Mr. Nowell had invested about one-third of the whole, and liable individually for much more. Notwithstanding all this he was willing to turn his investment over to the people, who ultimately got the property upon foreclosure, he taking as his consideration the deferred stock, now worthless, conditioned all the way through that they who were made whole would "make good" on the Johnson option. This latter requirement they either declined, refused or neglected to comply with, and when the meeting finally was held, as the suppressed and purloined evidence will show, if permitted a day

in court, the Johnson Group was eliminated, and all the parties interested knew it and were so informed before the meeting. Can any one say that a course such as was pursued by Mr. Nowell in any way smacks of inequity?

Can it be said in good conscience that all of these acts constituted a wrong and a fraud, as is so vigorously urged by counsel for appellees? We think not, but on the contrary believe that a case is here presented calling for the interposition of the chancellor.

It was not necessary to have set out the letter in full, copied in appellees' brief on page 26, nor the letter on pages 32 and 33, but good faith and honesty in pleading suggests that it should be done, and it was done. *In other words, the whole story is told by the bill of complaint and nothing suppressed.*

From this whole story it will be found that there is undoubted equity in the bill, and that the whole controversy should be heard in open court upon its merits.

In concluding this argument in reply we trust it will be helpful to the court to recapitulate appellees' position, which is as follows:

First: That appellees must wholly fail unless this court shall read into the bill many things found in other cases not in any sense or from any viewpoint before this court. To read in this extraneous matter is untenable and is prohibited by the well-recognized rules of pleading, yet it must be done to sustain appellees.

Second: That appellees rely solely upon the law

that appellants have cited, and practically concede they must lose unless all the rules governing the application of demurrers are changed so that extraneous matter may be read into a bill and become a part thereof.

Third: That appellees, in order to prevail, must have this court find that the "old suit" was one for specific performance, or breach of contract, and not one for remedy because of frauds perpetrated. The reading of the bill in the "old suit" and the decree made therein shows that it was a suit standing alone on fraud, and the remedy had in the decree granted alone because fraud was alleged, proved and established. Therefore appellees must be driven from this position and that part of their argument and reasoning fall.

Fourth: That a suitor who has suffered because of the undiscovered, unconscionable and fraudulent acts of the opposite side, which otherwise would turn the scale, where the sufferer could not and did not discover the wrong-doing in time to protect himself, is without remedy. This is a fair deduction from the whole argument of appellees. Such a rule we submit would violate every primary principle of equity. In fact, such a conclusion for a court of equity to reach would be unthinkable.

Fifth: That to sustain appellees, as shown by their argument, a premium would be placed upon the act of *wrongful purloining and secreting* the adversary's testimony before the trial and continuing the wrong even after demand has been made for its return. It

seems scarcely possible that so bold a course could, in this age, be even hinted at, to say nothing of being seriously argued.

Sixth: That a suitor in open court upon demand made upon him may mislead the court and disregard its orders by refusing to surrender purloined and concealed testimony, and when the act is discovered later in an equity suit setting up the fact, not only be rewarded for such act, but go hence and collect his costs. Such a course is to make a “laughing stock” of courts.

Seventh: That a court may be deceived by one who refuses to comply with its orders, and yet when the deception is unmasked have no right in equity to correct the false and fraudulent decree made because of suppressed testimony that would have changed the whole proceedings. This would leave it so that courts could not correct or redress wrong.

Resting secure in the complete and overwhelming justice of our cause, we pray that this court may reverse the decree of the lower court and thereby permit these appellants, who have been so sorely harassed and grievously wronged, to have a *real day* in court and remove the terrible stigma of this grossly unjust decree of fraud which has been spread upon the judicial records of this country.

Respectfully submitted,

JOHN P. HARTMAN,

GEORGE M. NOWELL,

Attorneys for Appellants.

United States
Circuit Court of Appeals
For the Ninth Circuit.

ALEXANDRINE ROUX,

Appellant,

VS.

THE COMMISSIONER OF IMMIGRATION
AT THE PORT OF SAN FRANCISCO,

Appellee.

Transcript of Record.

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CEIVED

OCT 23 1912

D. MONCKTON,
CLERK.

FILED

OCT 24 1912

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the Northern District of California, First Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the District Court of the United States in and for
the Northern District of California, First Division.*

No. 15,213.

In the Matter of ALEXANDRINE ROUX, on
Habeas Corpus.

Names and Addresses of Attorneys.

Petitioner and Appellant—MARSHALL B. WOOD-
WORTH, Esq., San Francisco, California.

Respondent and Appellee—JOHN L. McNAB, Esq.,
United States Attorney for the Northern Dis-
trict of California, at San Francisco.

[Title of Court and Cause.]

**Petition for Writ of Habeas Corpus and Order
Thereon.**

To the Honorable, the Said District Court of the
United States, Northern District of California:

The petition of the above named respectfully sets
forth and states:

That at all the times hereinafter mentioned or re-
ferred, and for more than three years last past con-
tinuously next preceding the filing of this petition
and of the date of her arrest as hereinafter alleged,
your said petitioner is and has been an actual resi-
dent and denizen of and in the City and County of
San Francisco, in the State and Northern District
of California, that is to say, your said petitioner has,
and for more than three years last past, had and con-
tinues to have and maintain, her fixed and abiding,

permanent and known residence, domicile, dwelling-place and abode at and in said City and County of San Francisco, within said Northern District of California, and has not at any time during her said residence changed or abandoned the same or taken up or removed, to any other place of residence, domicile or abode anywhere else located or situated;

That your petitioner lawfully came to the United States from the republic of France about ten years ago, arriving and landing at the port of New York on or about January, 1902, and thereafter came to San Francisco more than [2*] three years ago where she became a resident thereof and has since maintained her permanent, fixed and known residence and domicile at said City and County of San Francisco, State of California; that she is not an alien or other immigrant; that she has acquired and held her residence and enjoyed the same without molestation or interference until the time of her arrest as hereinafter stated;

That on or about the 1st day of October, 1911, the then Commissioner of Immigration at the port of San Francisco, having his official station at Angel Island, in said Northern District of California, unlawfully and by force of arms arrested and imprisoned your petitioner against her will and protest and without her consent, and placed your petitioner in custody as a prisoner and deprived her of her liberty at his official station at said Angel Island, Northern District of California aforesaid; and holds said petitioner in custody against her will and protest and

*Page-number appearing at foot of page of original certified Record.

threatens to and will deport said petitioner to the country whence she came unless stayed by the writ, order and judgment of this Court.

That your petitioner is not a prostitute, and never has been such, nor is she accused of being such, but she is a respectable woman, and the mother of a family whose children reside with her in California; that she is accused by said Commissioner of Immigration and is now being held by said Commissioner of Immigration and will be deported to France, unless restrained by the order and judgment of this Honorable Court, on the ground that she was employed by, in, or in connection with a house of prostitution solely and exclusively as a cook, all of which is alleged to be a violation of section 2 of the Act of March 26, 1910 (36 Stat. 263); [3]

That at the hearing held by said Commissioner of Immigration your petitioner was denied the right to have an attorney or legal counsel to represent her, at every or any stage of the proceedings; that she was advised that it was not necessary to have the services of an attorney or legal adviser to defend her; that on the contrary your petitioner, by and through said Immigration Commissioner, his subordinate officers employees was forced to submit to an inquisition and compelled to answer the interrogatories of said officers without being allowed the right of counsel, or any attorney to represent her;

That said charge was and is duly false, untrue and without foundation and fact, and this petitioner was ready and willing and able to prove to said immigration authorities that she had resided within the

United States, and at San Francisco, California, for the period of time claimed by her and that she was a domiciled resident of said San Francisco, California, and that she did not come within the provisions of the law upon which she was arrested and is about to be deported, unless restrained and liberated by the order and judgment of this Honorable Court.

That the provisions of section 2 of the Act of March 26, 1910, in so far as they apply to this petitioner, are unconstitutional and void and violate the guaranties of the federal constitution and the amendments thereto, and unlawfully discriminate against this petitioner and deprive her of due process of law, and are unlawful and illegal.

That your petitioner has exhausted all legal or other remedies provided by or specified in the Acts of Congress [4] relating to this subject matter.

Your petitioner further alleges that said imprisonment of your petitioner is unlawful and illegal in this, that your petitioner was not given a full or fair, or full and fair, or any legal hearing, before said Commissioner of Immigration, or otherwise.

That your petitioner was not given even the semblance of a hearing;

That said petitioner was denied the right of an appeal from the decision of the Secretary of Commerce and Labor, and that the only hearing allowed to her was a hearing before the Secretary of Commerce and Labor, the other hearings at San Francisco, California, before the Commissioner of Immigration, being merely private investigations made against this petitioner without her consent or her

presence or being represented by legal counsel or otherwise, or at all;

That petitioner was and is ordered deported without any due process of law or proof of any kind or character, proving or tending to prove the said alleged charge, wrongfully and illegally brought against her;

That your petitioner is now detained, imprisoned and restrained of her liberty and is a prisoner at said Angel Island, California, and is so held and imprisoned by the order and direction of the Secretary of Commerce and Labor and of the Commissioner of Immigration at San Francisco, California, who claim the pretended right to deport this petitioner;

That said Commissioner of Immigration threatens this petitioner that he will take, deport and carry away this petitioner to a foreign country, to wit, France, and that he will so deport this petitioner unless stayed by a writ of [5] this Court, or the order and direction of this Court.

WHEREFORE, your petitioner prays that a Writ of Habeas Corpus issue out of this Honorable Court, and that she be brought before this Court then and there to inquire into the cause of her said imprisonment; that, in the meantime, all proceedings against her be stayed and that she be not taken without the jurisdiction of this Court or her custody disturbed until a hearing hereon; that said Immigration officials be required to make a full and complete return showing the cause of detention of your petitioner; and that your petitioner, —————, be re-

stored to her liberty and go hence without day.

ROUX ALEXANDRINE.

State of California,
City and County of San Francisco,
Northern District of California,—ss.

Alexandrine Roux, being duly sworn, deposes and says: that she has heard read the foregoing petition for a Writ of Habeas Corpus and knows the contents thereof; that the same is true of her own knowledge except as to those matters which are therein stated on information and belief, and as to those matters that she believes them to be true.

ROUX ALEXANDRINE.

Subscribed and sworn to before me this 27th day of November, 1911.

[Seal]

RICHARD H. JONES,

Notary Public. [6]

Order [that Petitioner be not Removed from Jurisdiction of Court, etc.].

On reading the within petition and good cause appearing therefor, it is ordered that the respondent, the Commissioner of Immigration, at San Francisco, California, appear in this court on the — day of December, 1911, at 10 o'clock A. M., then and there to show cause, if any, why the Writ of Habeas Corpus should not issue as prayed for, and that during the pendency of these proceedings, the petitioner be not removed from the jurisdiction of the Court, and that a copy of this order and of said Petition be served upon respondent immediately.

U. S. District Judge.

Ordered that the Commissioner of Immigration, for port of San Francisco, show cause on November 29th, 1911, at 10 o'clock A. M. why Writ should not issue. That in the meantime and until further order said Commissioner shall retain the custody of Petitioner within the jurisdiction of this court. Nov. 28, 1911.

JOHN J. DE HAVEN,
Judge.

[Endorsed.] [7]

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday, the 28th day of November, in the year of our Lord, one thousand nine hundred and eleven. Present: The Honorable JOHN J. DE HAVEN, Judge.

[Title of Court and Cause.]

Motion for Order to Show Cause.

On Motion of Marshall B. Woodworth, Esqr., the Petition of Alexandrine Roux for a writ of habeas corpus was submitted to the Court for decision, and after due consideration had thereon, by the Court ordered that the Commissioner of Immigration for the port of San Francisco show cause before this Court on November 29th, 1911, at 10 o'clock of that day, why a writ of habeas corpus as prayed should not issue; further ordered that in the meantime and until the further order of this Court, said Commis-

sioner shall retain the custody of petitioner within the jurisdiction of this Court. [8]

[Title of Court and Cause.]

U. S. Marshal's Return as to Service of Order to Show Cause.

**UNITED STATES MARSHAL'S RETURN
UPON ORDER TO SHOW CAUSE.**

I, C. T. Elliott, United States Marshal in and for the Northern District of California, hereby certify that on November 28, 1911, I received from the attorney for the petitioner herein, one Certified Copy of Order to Show Cause in the above-entitled matter, which was certified to by the Clerk of the United States District Court in and for said district, and that thereafter, to wit, on said November 28, 1911, I handed to and left said Certified Copy of Order to Show Cause, together with copy of Petition, in this case, with Samuel W. Backus, Commissioner of Immigration personally, at Angel Island, California.

C. T. ELLIOTT,

U. S. Marshal,

By Elmo Warner,

Office Deputy.

San Francisco, California, November 29, 1911.

[Endorsed.] [9]

[Title of Court and Cause.]

Answer to Order to Show Cause.

Now comes Samuel E. Backus, Commissioner of Immigration at the port of San Francisco, by John

A. Robinson, Immigrant Inspector, and in return to the order to show cause issued by said Court upon the petition of said Alexandrine Roux for a writ of habeas corpus respectfully shows that your respondent holds the said Alexandrine Roux, also known as Josephine Roux, under an order of deportation signed by the Honorable Secretary of Commerce and Labor and dated the 13th day of November, 1911, a copy of which is hereto annexed and made a part hereof and marked Exhibit "A."

Your respondent on information and belief denies that for more than three years last past continuously next preceding the filing of this petition and of the date of the arrest of said Alexandrine Roux, or at any time or at all, the said Alexandrine Roux is and has been, or is or has been, an actual resident and denizen or actual resident or denizen of and in, or of or in, the City and County of San Francisco, in the State and Northern District of California.

And upon information and belief your respondent denies that said petitioner has and for more than three years last past had and continues or continues to have and maintain or have or maintain her fixed and abiding, permanent and known residence, domicile, dwelling and abode or her [10] fixed place and abiding or permanent and known residence or domicile or dwelling place or abode at and in or at or in said City and County of San Francisco, within the Northern District of California.

Your respondent further denies upon information and belief that said petitioner has not at any time during her said residence or at any other time or at

all changed or abandoned the same or taken up or removed to any other place of residence or domicile or abode anywhere else located or situated.

In this behalf your respondent alleges that the said petitioner did on the 29th day of August, 1911, arrive in the United States at the port of New York on board the steamship "Chicago," having arrived from France, and that ever since said time she has been employed by, in, and in connection with a house of prostitution and resort habitually frequented by prostitutes and where prostitutes gather.

Your respondent denies that on or about the first day of October, 1911, or at any other time, or at all, at the port of San Francisco he unlawfully and by force of arms did unlawfully or by force of arms imprison the petitioner.

Your respondent denies that at the hearing held by said Commissioner of Immigration said petitioner was denied the right to have an attorney or legal counsel to represent her at every or any stage of the proceedings.

And in this behalf your respondent alleges that at the time of and during the hearing and the taking of evidence by the Commissioner of Immigration at the port of San Francisco and at such stage thereof as the person before whom the hearing and the taking of evidence was held deemed proper, the [11] said petitioner was apprised that she might thereafter be represented by counsel and she was asked at that time whether or not she desired to avail herself of the right of counsel, and the said petitioner replied "As soon as my friends come I will be able to decide," and that

thereafter the said petitioner herein never made any request nor indicated any desire upon her part in any way whatsoever to avail herself of the right of counsel.

Your respondent denies that the said imprisonment of said petitioner is unlawful and illegal or unlawful or illegal in this that said petitioner was not given a full or fair or full and fair or any legal hearing before said Commissioner of Immigration or otherwise and in this behalf your respondent alleges that the said petitioner was given a full and fair and impartial hearing by the Commissioner of Immigration, and that the testimony and all thereof taken by said Commissioner of Immigration was forwarded to the Secretary of Commerce and Labor upon which the said Secretary of Commerce and Labor issued his warrant of deportation.

Wherefore your respondent prays that a writ of habeas corpus do not issue herein, that the order to show cause be discharged and the petition dismissed.

ROBT. T. DEVLIN,
Attorney for Respondent.

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

John A. Robinson being duly sworn, deposes and says: That he is a Chinese and Immigrant Inspector connected with the Immigration Service for the Port of San Francisco, and has been specially directed to appear for and [12] represent the respondent Samuel W. Backus, Commissioner of Immigration, in the within entitled matter; that he is familiar with

all the facts set forth in the within return to order to show cause, and knows the contents thereof, that it is impossible for the said Samuel W. Backus to appear in person or to give his attention to said matter; that of affiant's own knowledge, the matters set forth in the return to order to show cause are true, excepting those matters which are stated on information and belief, and that as to those matters, he believes it to be true.

JOHN A. ROBINSON.

Subscribed and sworn to before me this 1st day of December, 1911.

[Seal]

FRANCIS KRULL,
Deputy Clerk U. S. District Court, Northern District
of California.

Copy

Bureau of Immigration and Naturalization
L Form 8 B

Warrant-Deportation of Alien.

DEPARTMENT OF COMMERCE AND LABOR
Washington.

No. 53369/118.

Inc. 3582.

To William Williams, Commissioner of Immigration,
Ellis Island, N. Y. H.

Whereas, from proofs submitted to me, after due hearing before Immigrant Inspector F. Watts, Jr., held at Angel Island, California, I have become satisfied that the [13] alien Alexandrine (or Alexander) Roux, alias Josephine Roux, who landed at the port of New York, N. Y., ex S. S. "Chicago," on the 29th day of August, 1911, has been found in the United States in violation of the Act of Congress ap-

proved February 20, 1907, amended by the Act approved March 26, 1910, to wit:

That the said alien is unlawfully within the United States in that she has been found employed by, in, or in connection with a house of prostitution, or resort habitually frequented by prostitutes, or where prostitutes gather, and may be deported in accordance therewith.

I, Benj. S. Cable, Acting Secretary of Commerce and Labor, by virtue of the power and authority vested in me by the laws of the United States, do hereby command you to return the said alien to ———, the country whence she came, at the expense of the steamship company importing her.

For so doing this shall be your sufficient warrant.

Witness my hand and seal this 13th day of November; 1911.

[Seal]

BENJ. S. CABLE,

Acting Secretary of Commerce and Labor.

[Endorsed.] [14]

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Friday, the 1st day of December, in the year of our Lord, one thousand nine hundred and eleven. Present: The Honorable JOHN J. DE HAVEN, Judge.

[Title of Court and Cause.]

Hearing on Answer to Order to Show Cause.

This matter this day came on for hearing on the

return to the order to show cause issued directing the Commissioner of Immigration at the port of San Francisco to show cause why a writ of habeas corpus should not issue as prayed in the petition filed, Marshall B. Woodworth, Esqr., appearing for petitioner and Earl H. Pier, Esqr., Assistant U. S. Atty., appearing for the respondent, and thereupon by the Court ordered that this matter be, and the same is hereby referred to H. M. Wright, Esqr., as Special Referee and Examiner, to ascertain and report the facts on the issues raised by the return filed to the said order to show cause. [15]

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 4th day of December in the year of our Lord, one thousand nine hundred and eleven. Present: The Honorable JOHN J. DE HAVEN, Judge.

[Title of Court and Cause.]

Order Denying Motion to Admit Petitioner to Bail.

Marshall B. Woodworth, Esqr., attorney for petitioner herein this day came into court and made a motion that petitioner be admitted to bail pending the disposition of this matter, and after hearing Mr. Woodworth, by the Court ordered that said motion be, and the same is hereby denied. [16]

[Title of Court and Cause.]

Report of Special Referee and Examiner.

To the Honorable the Judges of the District Court
of the United States, in and for the Northern
District of California:

Upon the return of an order to show cause in the above-entitled matter the cause was, on December 1, 1911, referred to the undersigned as Special Referee and Examiner "to ascertain and report the facts on the issues raised by the return filed to said order to show cause." A certified copy of said order of reference is annexed to this report.

Accordingly, I was attended on Saturday, December 2, 1911, by Marshall B. Woodworth, Esq., attorney for the petitioner, and Earl H. Pier, Esq., assistant United States attorney, for the respondent the United States Commissioner of Immigration at the port of San Francisco. The parties were heard on said day and at the close thereof the assistant United States attorney requested a continuance of the hearing to procure the testimony of Immigration Inspector F. Watts, Jr., a material witness, who had been unexpectedly called to Washington, D. C., a few days prior to the hearing because of the serious illness of his mother. I thereupon continued the hearing until December 4, 1911, at 1:30 o'clock [17] P. M., stating that I would grant a further continuance if in the interval the petitioner were ordered released on bail by the competent court. At the hearing on December 4, at the hour above named, it appearing that bail had been denied, I denied the motion for the

further continuance and the cause was thereupon submitted. At the request of the attorney for the petitioner the proceedings were taken in shorthand by Clement Bennett, a competent and disinterested reporter, and were by him transcribed into typewriting. At the request of petitioner's attorney, though the same is not ordered to be done by the order of reference, I return herewith the said transcript of testimony duly authenticated as a true transcript by my signature upon the cover thereof. There was also introduced in evidence upon said hearing as Respondent's Exhibit 1 the immigration file containing a copy of the proceedings in the matter of said Alexandrine Roux before the respondent in the matter complained of in the petition, and this exhibit I likewise return with this report. Said transcript and said exhibit constitute all the evidence submitted at the hearing before me.

It will be noted that the order of reference requires me to find only the facts, and not my conclusions of law. Since the important question upon such petition for a writ is whether or not the petitioner had a fair and full hearing, and since, in my view, the determination of that question is a matter of law depending upon a knowledge of the facts, I have, after consideration, determined that the best way in which, I can fulfill the terms of the order to report the facts is to report not merely ultimate facts, but probative [18] facts. The question of fact emphasized by the petitioner upon the hearing was whether she was allowed a full opportunity to be represented by counsel before the Department of Commerce and Labor.

From the evidence submitted I find the following to be true:

The petitioner Alexandrine Roux is a French woman who came to the United States from France about nine years ago, landing at New York and thence soon after proceeding to San Francisco. During said period of nine years she has resided in San Francisco except for a temporary visit to France upon business matters between April, 1911, the month of her departure, and August, 1911, the month of her return. During much of this period of residence she was employed as a cook at various houses of prostitution managed by French women in the said city of San Francisco. On October 19, 1911, respondent recommended that the Secretary of Commerce and Labor should issue his warrant for the arrest of one Josephine, true name unknown, upon information obtained through private undisclosed sources by Inspector Robinson, that the said Josephine had arrived from France about three months prior thereto and was then employed in a house of prostitution at 55 Bartlett Alley, San Francisco, as housekeeper and "acting madam," by which I understand an acting female manager in the business of prostitution. Accordingly on October 21, 1911, a telegraphic warrant of arrest was issued by the Acting Secretary of Commerce and Labor and a formal warrant was mailed the same day and received on October 27th, authorizing the arrest of the alien Josephine and another (surnames unknown) for a violation of the Act of Congress approved February 20, [19] 1907, as amended by the Act approved March 26, 1910, upon

the following charge: "That the said aliens are unlawfully within the United States in that they have been found connected with the management of a house of prostitution; and that they have been found employed by, in or in connection with a house of prostitution or resort habitually frequented by prostitutes or where prostitutes gather." On October 24, 1911, petitioner was arrested by Immigration Inspector Robinson. She stated to him that her name was not Josephine and that she had never been called Josephine; that her name was Alexandrine Roux. The inspector stated that if it should be found that she was not the woman desired she would be immediately released. The petitioner was taken by Inspector Robinson to the Immigration Station on Angel Island and examined by Inspector Watts through an interpreter on the same day. Petitioner speaks very little English. At the close of the examination on said day she was instructed by Inspector Watts through an interpreter as follows: "By order of the Secretary of Commerce and Labor in a telegram dated October 21, 1911, you have been arrested on the charge that you are an alien employed by, in or in connection with a house of prostitution. You have the right to be represented by counsel and to see all the evidence against you. You will also be enlarged upon furnishing satisfactory bond in the sum of one thousand dollars. Do you desire to avail yourself of the right of counsel?" and the petitioner thereupon answered through the interpreter as follows: "As soon as my friends come I will be able to decide." Later in the same afternoon

petitioner's daughter, Rosalie Roux, and a friend, Mr. Lambard, called in her behalf at the Immigration Station at Angel Island and had [20] a conversation with Inspector Watts. They inquired of him the reason for the arrest and whether it was necessary to obtain a lawyer. Inspector Watts told them it was not necessary, that they should not bother, that the case did not amount to anything, and all that was necessary was for them to bring two witnesses to the Station for a further hearing, and in consequence of this statement no lawyer was obtained. He also advised them that she would be released upon furnishing bail in the sum of one thousand dollars. Later they interviewed the petitioner. The petitioner testified that the interpreter took her aside and told her that it was not necessary to employ an attorney, but in view of the interpreter's contrary testimony before me I make no finding as regards any alleged communication to this purport by the Government interpreter to the petitioner. On or about October 26th the petitioner was released on bail. On October 30 petitioner appeared for a further hearing before Inspector Ainsworth with a different interpreter in attendance, and the testimony of petitioner and two witnesses in her behalf taken. On November 4, 1911 the respondent transmitted the record in the case with the recommendation that a warrant of deportation issue. In said letter of recommendation the Commissioner found that "previous to her departure she was connected with the management of a house of prostitution and upon her return she continued that occupation." On Novem-

ber 13, 1911, the Acting Secretary of Commerce and Labor issued his warrant of deportation on the grounds specified in the warrant of arrest.

As regards the finding of the respondent transmitted to the Secretary of Commerce and Labor, I find that the petitioner was not at the time of her arrest or theretofore connected [21] with the management of a house of prostitution, saving and excepting that at the time of her arrest and for three weeks prior thereto she had been employd as cook and chambermaid at 55 Bartlett Alley, San Francisco, a house of prostitution. She did not live there, but resided in a flat of her own with her daughter at 1842 Mason Street, San Francisco. She is not and never has been a prostitute or woman of immoral character, and was not at the time of her arrest or at any time prior thereto connected with the management of a house of prostitution, but she was at the time of her arrest employed in a house of prostitution as cook and chamber-maid as above set forth. Petitioner testified under objection that she was not aware that her occupation was contrary to law. I find furthermore that her name is not Josephine and that at no time has she been known by that name.

I deem it proper to add to the above statement of facts my impression of the witnesses offered at the hearing. I have no reason to doubt the credibility of petitioner or of her witnesses. She is an ignorant French woman, a widow, about 40 years of age, whose most evident thought and desire at the hearing before the respondent was to prove that she was an "honest woman." She has two daughters, one

in France and the other living with her here, who appeared before me. The latter is a young woman of respectable appearance and modest demeanor, aged about 18 years, who is and for some time last past has been, employed as a dressmaker in this city in the establishment of Armand Cailleau, a merchant dealing in ladies' gowns and the like. Mr. Lambard, the other witness, is a clerk at the Emporium whose appearance was also favorable. Neither the petitioner *or* her witnesses impressed me as of the class likely [22] to associate with prostitutes, and the nature of her occupation is to be explained partly by her unfamiliarity with English, partly by the higher wages which she testifies were paid her in disreputable houses, and partly by the peculiar attitude of people of her class and nationality toward associations considered by us to be unworthy. The *witness* for the Government, Inspector Robinson and Mr. Lohse, impressed me as truthful, but I noticed with regard to Mr. Lohse's interpretation a tendency to allow the witness to talk at length before disclosing his interpretation and in such interpretations to give apparently his conclusions as to the substance of what was said in French by the witness.

Respectfully submitted this 12th day of December, 1911.

H. M. WRIGHT,
Special Referee and Examiner.

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Friday the first day of December in the year of our Lord, one thousand nine hundred and eleven. Present: The Honorable JOHN J. DE HAVEN, Judge.

[Title of Court and Cause.]

[Order Referring Cause to Special Referee.]

This matter this day came on for hearing on the return [23] to the order to show cause issued directing the Commissioner of Immigration at the port of San Francisco, to show cause why a writ of habeas corpus should not issue as prayed in the petition filed. Marshall B. Woodworth, Esqr., appearing for petitioner and Earl H. Pier, Esqr., Assistant U. S. Atty., appearing for the respondent, and thereupon by the Court ordered that this matter be, and the same is hereby referred to H. M. Wright, Esqr., as Special Referee and Examiner, to ascertain and report the facts on the issues raised by the return filed to the said order to show cause.

I hereby certify that the foregoing is a full, true and correct copy of an original order made and entered in the above-entitled matter.

Attest my hand and seal of said District Court, this 1st day of December, A. D. 1911.

JAS. P. BROWN,
Clerk.

By M. T. Scott,
Deputy Clerk.

[Endorsed.] [24]

[Title of Court and Cause.]

**Testimony Taken Before Special Referee and
Examiner.**

Saturday, December 2d, 1911.

Monday, December 4th, 1911.

APPEARANCES:

E. H. PIER, Esq., for the United States.

MARSHALL B. WOODWORTH, Esq., for the
Petitioner. [25]

The COMMISSIONER.—I wish to call the attention of the parties to the terms of the order of reference in this matter which are as follows:

It is referred to me to ascertain and report the facts on the issues raised by the return filed on the said order to show cause. It differs somewhat from other orders of reference in that it does not require me to report the testimony; consequently if the parties should desire a transcript of the testimony to accompany the report they will have to arrange with the reporter to pay his charges for it. You may proceed.

Mr. WOODWORTH.—Do I understand that your Honor passes upon any questions of law, or simply reports the facts?

The COMMISSIONER.—I am not asked to report conclusions of law, but only findings of facts.

Mr. WOODWORTH.—Very well. If your Honor please, a petition for a writ of habeas corpus was presented to the District Court on behalf of this lady, Alexandrine Roux, stating that she was un-

lawfully detained by the Commissioner of Immigration by virtue of a warrant of deportation which had been previously issued by the Secretary of Commerce and Labor. The petition states generally that she is not an alien, or other immigrant, that she is a resident of the United States, to wit San Francisco, California, which she has enjoyed for a period of some ten years. The principal fact upon which your Honor will be asked to report is with reference to the allegation contained in the petition as follows:

“That at the hearing held by said Commissioner of Immigration your petitioner was denied the right to have an [26] attorney or legal counsel to represent her, at every or any stage of the proceedings; that she was advised that it was not necessary to have the services of an attorney or legal adviser to defend her; that on the contrary your petitioner, by and through said Immigration Commissioner, his subordinate officers employees was forced to submit to an inquisition and compelled to answer the interrogatories of said officers without being allowed the right of counsel, or any attorney to represent her.”

There are some other matters stated in the petition, but as I have already stated the principal fact upon which your Honor will be asked to report is with reference to the question of counsel.

[Testimony of Rosalie Roux, for Petitioner.]

ROSALIE ROUX, for the petitioner, sworn.

Mr. WOODWORTH.—Q. What is your name?

A. Rosalie Roux.

Q. Are you the daughter of Alexandrine Roux, this lady (pointing)?

A. Yes, sir.

(Testimony of Rosalie Roux.)

Q. Who has sued out a petition for a writ of habeas corpus? A. Yes, sir.

Q. Where do you reside?

A. 1842 Mason Street.

Q. Do you reside there with your mother?

A. Yes, sir.

Q. Have you lived there for some time past, and if so how long? A. About three years.

Q. About three years at that particular place?

A. Yes, sir.

Q. How long have you resided in the United States?

Mr. PIER.—We object to the question on the ground that it is incompetent, irrelevant and immaterial, and not bearing [27] upon any of the issues in this case.

Mr. WOODWORTH.—It is preliminary, and it may throw some light on the matter.

The COMMISSIONER.—I overrule the objection. Proceed with the witness.

A. Nine years, going on ten years.

Mr. WOODWORTH.—Q. Are you employed here, or are you going to school?

Mr. PIER.—I object to the question on the ground that it is incompetent, irrelevant and immaterial, all questions that run along this same line, not bearing on the issues in this case whatever, it being merely a question to determine whether or not a fair hearing was given to this petitioner by the Immigration authorities.

(Testimony of Rosalie Roux.)

Mr. WOODWORTH.—It is purely a preliminary question.

The COMMISSIONER.—I will overrule the objection. You may have your exception to the question.

Mr. PIER.—It will apply to all this line of questions.

A. I am employed here at Armand Cailleau's.

Mr. WOODWORTH.—Q. How long have you been employed there? A. Six years.

Q. Do you remember the occasion when your mother was arrested by the Immigration officials?

A. She was arrested on Monday morning, I went over to the Island, and I was told—

Q. How long ago? A. Six weeks ago.

Q. When did you first hear that she had been arrested?

A. At 11 o'clock at where I was working.

Q. What did you then do?

A. I went over to the custom-house. They told me to go over on the 2:45 boat, which I did, [28] to Angel Island. I went to see Mr. Watts there.

Q. Did anybody go with you at that time?

A. Mr. Lombard.

Q. This gentleman here in court (pointing)?

A. Yes, sir.

Q. You went to Angel Island? A. Yes, sir.

Q. Did you see your mother at first?

A. No, sir, I did not.

Q. Who did you first see at Angel Island?

A. Mr. Watts.

(Testimony of Rosalie Roux.)

Q. Did you have any conversation with Mr. Watts at that time? A. Yes, sir, I did.

Q. What was the subject of that conversation? In the first place who was present at that conversation? A. Mr. Lombard.

Q. Anyone else besides Mr. Lombard, Mr. Watts, and yourself? A. No, sir.

Q. What was the substance of that conversation?

Mr. PIER.—I object at this time to the question on the ground that it is incompetent, irrelevant and immaterial, it having no bearing upon any issues in this case. The question is as to whether or not she was given a fair hearing before the Immigration authorities. Whatever may have taken place extraneous to the hearing before the Immigration authorities on behalf of this woman does not in any way bear on this case whatever.

The COMMISSIONER.—I overrule the objection.

Mr. WOODWORTH.—Q. Answer the question.

The COMMISSIONER.—Read the question, Mr. Reporter.

(The reporter reads the question.)

A. He asked me if she was my mother. I told him, "Yes." He asked me if she was arrested this morning. I did not know [29] the reason why, or anything. I asked Mr. Watts, if it was necessary for me to get a lawyer and he told me no, so I did not bother to get a lawyer. If I did I could have taken one there.

Mr. PIER.—I ask that that answer be stricken

(Testimony of Rosalie Roux.)

out as having no bearing on any issues of this case whatever.

The COMMISSIONER.—The motion is denied.

Mr. WOODWORTH.—Q. Did he state anything further? A. No, sir.

Q. That was the substance of the conversation that you had with him at that time?

A. He told me to take two witnesses with me, that was all that was necessary. That is what I did.

Q. He told you what?

A. To take two witnesses with me, that was all that was necessary.

Q. Did he say where to bring those witnesses?

A. He told me I would be talked to.

Q. Your mother did not employ an attorney at all? A. No, sir.

Mr. WOODWORTH.—That is all.

Mr. PIER.—No question.

[**Testimony of Mrs. Alexandrine Roux, on Her Own Behalf.**]

Mrs. ALEXANDRINE ROUX, the petitioner, sworn.

The COMMISSIONER.—Does she understand English?

Mr. WOODWORTH.—No. We will have an interpreter.

The COMMISSIONER.—Is the interpreter satisfactory to the Government?

Mr. PIER.—Yes.

(Paul Lohse was sworn as interpreter.)

Mr. WOODWORTH.—Q. Mrs. Roux, you were

(Testimony of Mrs. Alexandrine Roux.)

arrested by the Immigration officials sometime ago for being unlawfully [30] in the United States, were you? A. Yes, sir.

Q. When did you first come to the United States?

A. About nine years ago.

Q. Did you come here with your daughter, this young lady who has just testified? A. Yes, sir.

Q. Have you resided here ever since?

A. Yes, sir, I have resided here continuously, but went once to France.

Q. How long ago did you go to France?

A. I left here in the month of April, and came back in the month of August.

Q. This year? A. Yes, sir.

Q. What was the purpose of your going to France?

A. For family business matters.

Q. Did your husband die previous to that in France? A. Yes, sir.

Q. That was purely a temporary visit, was it not?

A. Temporary only.

Q. You left your daughter here in San Francisco during your visit to France? A. Yes, sir.

Q. You were arrested as the petition sets forth, not on the charge of being a prostitute, but on the charge of violating a provision of section 2 of the Act of March 26th, 1910, in that you were employed by, or in connection with a house of prostitution. Was that the charge?

Mr. PIER.—I object to the question as incompetent, irrelevant and immaterial. The record is the best evidence of what the charge was against her.

(Testimony of Mrs. Alexandrine Roux.)

Mr. WOODWORTH.—I suppose so.

Q. You were arrested for being employed as a cook in a house of prostitution, weren't you?

Mr. PIER.—I still object to that question on the same ground; furthermore it has no bearing on this case, and [31] it is incompetent, irrelevant and immaterial on what charge she was arrested. The question here is whether or not she had a fair hearing before the Immigration officers.

The COMMISSIONER.—Is there any substantial issue on that question?

Mr. WOODWORTH.—No, your Honor, there is not. She was arrested not for being a prostitute, but for being employed as a cook in a house of prostitution.

The COMMISSIONER.—You can introduce the record. That is the best evidence. I will sustain the objection on that ground.

Mr. WOODWORTH.—Q. When you were arrested and taken to Angel Island, did you have any conversation with any official as to your case, and if so, with whom?

A. I had no conversation with any of the employees.

Q. Did you have any conversation with any of the officials, and, if so, what was that conversation?

A. No, sir.

Q. Did you have any conversation with any official with reference to employing counsel to represent you in this matter? A. I had.

Q. What was that conversation? (Witness talks

(Testimony of Mrs. Alexandrine Roux.)

at length in French.)

The COMMISSIONER.—Mr. Interpreter, you will have to tell the witness that she must answer in sections so that you can interpret it in sections, otherwise we have to trust to your memory which we should not have to do. Ask that question over again. She can say all that she wishes in response, but she must give you a chance to interpret. Read the question, Mr. Reporter. (The reporter reads the question.)

A. It is with you that I had the conversation, and [32] you told me there was no necessity of having a lawyer.

The COMMISSIONER.—Your interpretation refers to yourself when you mention the word “you”?

[Longhand written at top of page:] “You” in witness’ answers, refers to the interpreter, who was also interpreter at the hearing at Angel Island. H. M. Wright, Sp. Referee &c.

The INTERPRETER.—Yes, to myself.

The COMMISSIONER.—Q. Ask her if she has completed her answer. A. I have.

Mr. WOODWORTH.—Q. You do not understand very much English, do you? A. No, sir.

Q. And you do not speak very much English?

A. No, sir.

Q. Who else was present at the time that this conversation was had with the interpreter at Angel Island. Was the name of the gentleman, Mr. Robinson? A. No, sir.

Q. Was it Mr. Watts? A. Yes, sir.

(Testimony of Mrs. Alexandrine Roux.)

Q. Mr. Watts? A. Yes, sir

Q. Did the interpreter propound the questions from Mr. Watts to you when this conversation was had with the interpreter?

A. I think so, as long as you have interpreted it.

Q. Was he present at the time? A. Yes, sir.

Q. All that you know is that this gentleman, the interpreter, held this conversation with you in presence of Mr. Watts?

A. I was there when Mr. Watts was there.

Q. Was this conversation held when you were first taken to Angel Island under arrest?

A. The conversation took place at 10 o'clock in the morning of the same day that I was arrested. [33]

Q. Was anybody else present at that conversation when you were advised not to get a lawyer, besides the interpreter, Mr. Watts, and yourself?

A. There was a man who was writing.

Q. A stenographer is that it?

A. I don't know.

The COMMISSIONER.—She would not know about that.

Mr. WOODWORTH.—Q. Did you employ a lawyer at all during the proceedings before the Department of Commerce and Labor? A. No, sir.

Q. Would you have employed a lawyer had it not been for this advice or statement of these officials to the effect that you did not need a lawyer?

A. I would have had one, if you had not told me there was no necessity to have a lawyer.

Q. Did you appreciate the gravity of the charge

(Testimony of Mrs. Alexandrine Roux.)

made against you that it would result in your banishment from this country?

A. Yes, sir, because I received a letter to that effect.

Q. From whom did you get a letter?

A. The name is on the letter.

Q. Where is the letter? Is this the letter (handing)? A. Yes, sir.

Mr. WOODWORTH.—I offer this letter in evidence as part of this testimony of this lady. She makes reference to a letter—she does not understand my question evidently—received only last Friday which states that she has been ordered deported. My question was directed to the point as to whether she appreciated the gravity of the charge at the time she was arrested.

Mr. PIER.—I object to the question on the ground that it is irrelevant, incompetent and immaterial whether or not she did appreciate the gravity of the charge, as to whether she was given a fair hearing before the Board of Immigration authorities. [34]

The COMMISSIONER.—I will overrule the objection.

Mr. PIER.—I will take an exception.

Mr. WOODWORTH.—Q. Ask her when she was arrested, if she appreciated the seriousness of the charge?

A. No, sir, because I was not arrested under my own name. I did not appreciate it because I was not arrested under my own name.

Q. Under what name were you arrested?

(Testimony of Mrs. Alexandrine Roux.)

A. Josephine.

Q. Is that your name? A. No, sir.

Q. Has that ever been your name? A. No, sir.

Q. Have you ever been a prostitute at all?

A. No, sir.

Q. You have simply been employed as a cook?

A. Yes, sir.

Cross-examination.

Mr. PIER.—Q. What place was it that you were working at as a cook? A. 5 Bartlett Alley.

Q. What is the name that they called you there?

A. Josephine.

Q. That is the name you were arrested under?

A. Yes, sir, that is the name under which I was arrested. My name is Alexandrine and is not Josephine.

Q. But they call you Josephine at the house of prostitution? A. No, sir.

Mr. WOODWORTH.—She does not understand. She is a very ignorant woman.

The COMMISSIONER.—Read the question, Mr. Reporter. (The reporter reads the question). Try and make that clear to her, Mr. Pier.

Mr. PIER.—Q. To get this matter clear, what name did the people call you at this house of prostitution at [35] which you worked as a cook?

A. Alexandrine.

Mr. WOODWORTH.—She did not understand you.

Mr. PIER.—Q. What did you mean then when you said a little bit ago that they called you Joseph-

(Testimony of Mrs. Alexandrine Roux.)

ine at that house?

A. No one called me Josephine at that house; only Mr. Robinson who went there when I was arrested.

Q. Have you never been called Josephine at any place? A. No, sir.

Q. When you were first arrested that morning by the Immigration authorities you were taken to Angel Island, were you not? A. Yes, sir.

Q. And you were questioned that morning?

A. No, sir, the next day.

Q. The next day you were questioned?

A. Yes, sir.

Q. You were questioned by whom?

A. By Mr. Watts.

Mr. WOODWORTH.—That is referring to the interpreter?

Mr. PIER.—Yes.

Q. At the end of that questioning, or that conversation that you had with Mr. Watts, and the interpreter, you had this conversation in reference to the employment of counsel, is that right?

A. I asked you and you told me it was not necessary.

Q. I am simply asking when this took place. Was it at the end of the questioning on the first morning?

Mr. WOODWORTH.—I submit the interpreter should give the answer of the lady. He tells her that is not the question. I think it is.

The INTERPRETER.—She will not say.

Mr. WOODWORTH.—I understand her, and Mr. Devlin understands her as he speaks French. Tell

(Testimony of Mrs. Alexandrine Roux.)

us what she said. [36]

The INTERPRETER.—She said nothing.

The COMMISSIONER.—Read the question again and tell us exactly, Mr. Interpreter, what she says each time.

(The reporter reads the question).

A. You took me to one side and talked to me.

Mr. PIER.—Q. I asked you when it was.

A. It took place when you took the papers away from me.

Q. What papers?

Mr. WOODWORTH.—She said when you took her marriage papers.

A. When you took the papers away from me containing my marriage certificate.

The COMMISSIONER.—Her marriage certificate?

Mr. WOODWORTH.—Her marriage certificate.

Mr. PIER.—Q. Was this the morning that you were arrested, or the next morning?

A. The next day.

Q. At the end of the conversation, or the questioning of the first day, did not Mr. Watts through the interpreter state to you that you had been arrested upon a telegraphic warrant of the Secretary of Commerce and Labor on the charge that you had been an alien employed by, in, or in connection with a house of prostitution, and he further stated that you had the right to be represented by counsel and to see all the evidence against you, that you would be enlarged upon the furnishing of a satisfactory bond in the sum

(Testimony of Mrs. Alexandrine Roux.)

of \$1,000, and did he not say: "Do you wish to avail yourself of the right of counsel?" Do you remember being asked that question by Mr. Watts?

Mr. WOODWORTH.—Let the record show that this statement of Mr. Watts is contained at the very end of her examination.

Mr. PIER.—I have stated that.

A. You never told me that.

The COMMISSIONER.—Whom does she refer to by "you"? [37] Is that the interpreter?

The INTERPRETER.—Yes, sir. The interpreter never told her that.

Mr. PIER.—Q. Don't you remember Mr. Watts ever telling you through the interpreter that you could have counsel and an attorney?

A. No, sir, I do not remember.

Q. Just to see if I can refresh your memory in some way let me ask you, don't you remember some occasion on which Mr. Watts told you that you had a right to be represented by counsel, and you said you wanted to see your friends first, and then decide whether you wanted counsel or not?

A. As I did not understand everything I took what the interpreter said. The interpreter said there was no necessity of having a lawyer.

Q. I would like to have that question read to her again and get an answer if possible.

The COMMISSIONER.—Read the question, Mr. Reporter. (The reporter reads the question.)

A. I could not answer him because I did not understand English.

(Testimony of Mrs. Alexandrine Roux.)

Mr. WOODWORTH.—Q. Meaning Mr. Watts?

A. Yes, sir.

Mr. PIER.—Q. Did he not address a question like that to you, through the interpreter?

A. You have told me and you answered me no.

The COMMISSIONER.—What is that?

The INTERPRETER.—The interpreter answered her no.

Mr. PIER.—Ask her that question again.

The COMMISSIONER.—Q. Ask it in this form. Do you remember saying to the interpreter in response to a question advising her of her right to counsel that you wished to consult your friends first, so that her mind will be [38] directed to the interpreter, and not to Mr. Watts?

A. You answered me, there was no necessity to have a lawyer.

Mr. WOODWORTH.—And she added, “you said there was nothing to my case.”

The INTERPRETER.—Yes.

Mr. PIER.—I still have no answer to my question.

Q. Do you remember ever being told by the interpreter that you had been arrested on the charge of being an alien employed in, by, or in connection with a house of prostitution?

A. Yes, sir, and I told you at the time if I had known that that was the case I would not have worked there, and I should have been notified.

Mr. WOODWORTH.—That it was against the law to work in those places?

The INTERPRETER.—Yes.

(Testimony of Mrs. Alexandrine Roux.)

Mr. PIER.—Q. Do you remember being told that you would be allowed to go at large upon furnishing a bond of \$1,000?

A. I was not told so. When Mr. Robinson arrested me he told me there was nothing to it.

Q. At the time you were arrested?

A. Yes, sir.

Q. You mean this man right here (pointing)?

A. (In English.) Yes, sir.

Q. He told you? A. (In English.) Yes, sir.

Q. At that time you also talked to him and told him the date that you arrived in this country, and the name also of the boat you came on, didn't you?

A. Yes, sir.

Q. He did not talk to you in French, did he?

A. No, sir.

Q. He talked to you in English and asked you what boat you came on, didn't he? A. Yes, sir.

Q. And you told him the boat you came on?

A. I showed him the papers, and I was taken to the Island under the name of Josephine. [39]

Q. He also asked you where you lived, didn't he?

A. Yes, sir.

Q. And you told him where you lived, did you?

A. Yes, sir, and he wanted to see my room, and I told him no I did not have a room, I had a flat. He took the papers away that were in the trunk.

Mr. WOODWORTH.—Q. This flat is where you resided with your daughter, is it not?

A. Yes, sir.

Mr. PIER.—Q. You told him you resided there

(Testimony of Mrs. Alexandrine Roux.)

with your daughter? A. Yes, sir.

Q. You told him where your daughter worked?

A. Yes, sir.

Q. And told him all about where you were, and about living there with your daughter for a number of years, is that right? A. Yes, sir.

Q. You told him that your daughter worked down in Armand Cailleau's cloak house, didn't you?

A. I don't know whether it is a company, or not. I only know she works at Cailleau's.

Q. You told him she worked at Cailleau's, did you not? A. Yes, sir.

Q. And you wanted to telephone to her down there before you went to Angel Island? A. No, sir.

Q. Didn't you want to telephone to your daughter?

A. No, sir.

Q. Did you not ask him to telephone to your daughter? A. No, sir.

Q. You did not ask him if you could telephone to your daughter?

Mr. WOODWORTH.—She said to inform her daughter of her arrest, which was done.

Mr. PIER.—Q. When Mr. Robinson took you up to your house there was somebody in your flat, was there not? A. Yes, sir.

Q. There was a girl there, was there not?

A. Yes, sir.

Q. Mr. Robinson asked you if that was your daughter, did he not? [40] A. Yes, sir.

Q. And what did you tell him she was?

A. I answered him, no, it was not my daughter.

(Testimony of Mrs. Alexandrine Roux.)

Mr. Robinson asked me if I brought her from France, and I told him I never brought anybody from France.

Q. Did you tell him where she came from?

A. No, sir; I did not know, she was a friend.

Q. Didn't you tell him she came from Portland?

A. No, sir.

Q. Where did she come from?

Mr. WOODWORTH.—I object to this line of examination as improper.

A. I don't know.

The COMMISSIONER.—I do not see that it will lead to anything.

Mr. PIER.—Q. When the interpreter told you that there was no necessity for having counsel, was Mr. Watts present at that time?

A. Yes, sir, he was present.

Q. And was the stenographer present?

A. Yes, sir.

Q. After that you had a second hearing before the immigration authorities, did you not?

A. The second time when they made me return to the Island.

Q. And you brought witnesses with you, did you not? A. Yes, sir.

Q. You had been enlarged upon bail before your second hearing? A. Yes, sir.

Q. Who got your bail for you? A. Mr. Esmion.

Q. How did he know to get your bail?

A. My daughter told him.

Q. Your daughter told him? A. Yes, sir.

(Testimony of Mrs. Alexandrine Roux.)

Q. How did she know that you could get enlarged upon bail? A. I do not know. [41]

Q. Did you have any talk with your daughter after being examined by Mr. Watts that morning, and before you were enlarged upon bail?

A. Yes, sir, my daughter was present here and Mr. Lombard was present also.

Q. Was there not any talk of your getting out on bail at that time? A. I don't know.

Q. Did you ever have a talk with anybody about getting out on bail? A. I don't know.

Q. Didn't you talk of getting enlarged on bail at all? A. I don't know.

Q. When Mr. Robinson arrested you that morning did you not ask him how much the bail was generally fixed at in this class of cases?

A. No, sir; I was told I would not have to go to the Island. I would only have to go to the office, and if it was not my name they would let me go at once.

Q. Did you not ask anybody about what the amount of bail would be in these kind of cases at all?

A. No, sir.

Q. Now, let me just remind you. When you got back to your flat, when Mr. Robinson took you up there, did you not ask him what the bail was fixed at in this case? A. No, sir.

Mr. PIER.—That is all.

Redirect Examination.

Mr. WOODWORTH.—Q. Did you know it was against the law to work in these places at all?

Mr. PIER.—I object to the question as incompe-

(Testimony of Mrs. Alexandrine Roux.)

tent, irrelevant and immaterial whether or not she knew it was against the law.

Mr. WOODWORTH.—It goes to good faith. I do not think it will do any harm.

The COMMISSIONER.—I will allow it.

A. No, sir. [42]

Mr. WOODWORTH.—Q. Were you ever notified by Mr. Robinson, or any other public official, that it was against the law to work in these places, and to desist?

Mr. PIER.—We object to that. There is no burden upon any of the Government officials to notify the people who work in these kind of places.

The COMMISSIONER.—I will sustain the objection.

[Testimony of Laurent Lombard, for Petitioner.]

LAURENT LOMBARD, called for the petitioner, sworn.

Mr. WOODWORTH.—Q. Where do you reside?

A. Daly City.

Q. Where is that?

A. That is right on the county line. It used to be called Hillcrest.

Q. What is your business?

A. Stock clerk at the Emporium.

Q. How long have you been employed there?

A. Over five years.

Q. Are you a man of family?

A. Yes, sir, I have got a wife and daughter.

Q. Do you know Mrs. Alexandrine Roux?

(Testimony of Laurent Lombard.)

A. Yes, sir, I know her.

Q. And also her daughter? A. Yes, sir.

Q. How long have you known both of them?

A. Very shortly after they came to this city.

Q. Some nine years ago?

A. Yes, I think so, nine years.

Q. When this lady got into trouble, and was arrested by the Immigration officials, did anybody call on you for advice?

A. Yes, sir, her daughter came to see me at the Emporium.

Q. What did you do?

A. I asked for a pass and went out with her. [43]

Q. To Angel Island?

A. No, sir, we did not know where her mother had been taken to.

Q. Where did you go?

A. Her daughter brought me to the Immigration office. We did not know the place. We asked the policeman at the corner of Fourth and Market, and he directed us to the Appraisers' Building.

Q. Did you there obtain a pass to go to Angel Island?

A. We went to work to find out why she was arrested.

Q. Did you go to Angel Island with the daughter?

A. They gave us a pass there, and we went to Angel Island the same afternoon.

Q. On the same day that she was arrested?

A. On the same day that she was arrested.

Q. Whom did you meet at Angel Island?

(Testimony of Laurent Lombard.)

A. Mr. Watson.

Q. Mr. Watts? A. Yes, sir.

Q. Did you have a conversation with Mr. Watts at that time? A. I certainly did.

Q. Who was present at that conversation with Mr. Watts at Angel Island?

A. All the conversation with Mr. Watts was mixed in. I was with Rosalie Roux, the daughter of the lady.

Q. She was present, and he was present?

A. Yes, sir.

Q. Anybody else present at that conversation?

A. Not in the main conversation.

Q. What was said about the employment of counsel? Did you speak to Mr. Watts, and ask him what was necessary to be done? A. Yes.

Q. Just tell his Honor about it.

A. I want to explain to you that I am very friendly with those two ladies. I know them since they are here, and, of course, the daughter did not know anything about it at the time. I wanted to find out myself. I wanted to find out what was to be done, so we went [44] there, and spoke to Mr. Watts.

The COMMISSIONER.—Q. What did you say?

A. I asked him about it, what was the trouble. He says, "I cannot give you much information," but he asked me a few questions, and asked a question also of the daughter of the lady. He says, "Well, the case is not much, that is all right; don't trouble yourself. She can go out on bail for \$1,000; \$1,000 bail

(Testimony of Laurent Lombard.)

will get her out of here, and all she has to do is to take two witnesses along at the first meeting of the Commissioners"—I don't know how they call them.

Mr. WOODWORTH.—Q. At the hearing?

A. At the hearing. "The two witnesses only have to tell what they know about the lady; if the lady is all right it will only be a matter of a few days." We spoke quite a long while on this subject, and when it was nearly all over he asked us if we wanted to see Mrs. Roux. I said, "Certainly, we certainly came for that purpose." He said, "Just wait a few moments, I will go up and see her." He went up and came back. Before he went he told us that we could see her for a little while, but we could not stay alone with her.

Q. You had to have an interpreter present?

A. No, sir, that he should be there with us, so I did not see any objection whatever, so we spoke with the lady for about three or four or five minutes perhaps at the longest time, and she was sent back to her quarters. Then we had another talk with Mr. Watts about the case. We had plenty of time to wait, and we had no place to go to, and I asked him then about a lawyer.

The COMMISSIONER.—Q. What did he say?

A. Then he told me.

Q. What did you say about the lawyer? [45]

A. That I wanted to know if really the case needed a lawyer. I never had had any trouble in the last 24 years.

Q. What did he say?

(Testimony of Laurent Lombard.)

A. He said, "Oh, well, it is no use, that case is all right; you don't need no lawyer."

Mr. WOODWORTH.—Q. That is what he said?

A. That is what he said.

Q. That was said in the presence of the daughter?

A. That was said in the presence of the daughter. That is all I can say.

Q. Did you then advise with the young lady about that? A. Certainly.

Q. Did you advise the lady with reference to that matter—did you advise Mrs. Roux not to get a lawyer?

A. I told her daughter. We went out to try to get the bail then. We never talked about the lawyer at all. We went to work to get the bail, and we did raise the bail—that is I did not, but the young lady did.

Q. What I want to know is this—I don't know whether you understand me—as the result of this conversation with Mr. Watts in which he said it was not necessary to have a lawyer, did you then advise Mrs. Roux she need not get a lawyer?

A. I certainly did. I did because I did not think it was of any use to spend more money than she had, because I knew her position just as well as I knew mine.

Cross-examination.

Mr. PIER.—Q. You say you have known these people about nine years? A. Yes, sir.

Q. Very intimately?

A. Yes, sir, I could tell you a little more. She

(Testimony of Laurent Lombard.)

lived for three years with us. [46]

Q. You know that about a year, or less than a year, she went home to France?

A. I know because I took her flat.

Mr. WOODWORTH.—About a year ago?

Mr. PIER.—Q. Within the last year?

A. Within the last year.

Q. She went home to France?

A. Yes, the daughter was living with us in her flat.

Q. And she returned from there in the last few months?

A. She returned to us I think on the 2d of September—no, the 5th of September. It was the day after labor day.

Q. That she got back from France?

A. Yes, I think so.

Mr. WOODWORTH.—When was she arrested?

Mr. PIER.—Q. How long had she been working around this house where she was employed as cook?

A. She was not working very long at that job. She was idle for quite a while when she came back.

Q. Did she work in those houses before she went to France? A. Yes, sir.

Q. Then, you went over there, and had this conversation with Mr. Watts that you have told us of here. You asked him if it was necessary to employ counsel, didn't you? A. I did.

Q. And he simply told you it was not necessary. Was that not the idea? Your idea was to find out whether or not you had to have a lawyer to conduct

(Testimony of Laurent Lombard.)

the case before that department?

A. He says, "Never mind about a lawyer, there is hardly anything to it." Furthermore, he says, "You just come, you and your wife, you don't need any other witnesses."

Q. That is what he said, "Just you and your wife come"? A. Yes, sir. [47]

Q. "You don't need any other witnesses?"

A. No, sir.

Q. Then you requested an opportunity to talk with Mrs. Roux, is that correct?

A. Not after he told me that.

Q. When you first met him, and had a talk with him, when you first got to the Island?

A. Yes, sir.

Q. To allow you to talk with her?

A. Not right away. We had to wait a little while.

Q. You had a talk with him during that visit?

A. Yes, sir, before we saw Mrs. Roux.

Q. During that conversation with Mrs. Roux was anything said about getting her out on bail? Did you say anything to her about getting her out on bail?

A. I could not say that. Really I don't know if I told her, or told her the next day. We could not see her the second time.

Q. You could not see her the second time?

A. That same day. We could not see her the second time the same day.

Q. When were you advised as to being allowed to go out on bail?

(Testimony of Laurent Lombard.)

A. She did not tell me. Mr. Watts told me.

Q. Was there not anything said at that conversation between you and her as to getting out on \$1,000 bail?

A. I told her I was going to find out from some friends, who were more posted about it, to see if I could do something for her. I told her "I am going to see some one who will attend to the case better than I could."

Q. And would see to getting bail for her?

A. I did not tell her that at that time.

Q. Did you ever see that paper before, or a paper similar to it (handing)?

A. He gave me two of those. [48]

Q. Mr. Watts did?

A. Yes, sir. That was after we saw Mrs. Roux.

Q. Did you ask him what kind of a bond you would have to give?

A. Yes, sir, we asked him that. I said "Between a couple of friends of ours we can raise \$1,000 bail." He says, "It is better to go, and see a surety company," and he gave us two addresses. If I remember right, one was the Pacific Surety Company, and another one.

Q. The Illinois Surety Company?

A. Yes, sir, I think so. I could not tell you. I know one was the Pacific.

Q. You went to the Massachusetts?

A. I did not go to the Massachusetts.

Q. Did you ask him for one of these forms of bonds?

(Testimony of Laurent Lombard.)

A. He gave me two forms in case that one would not be filled out right.

Q. He gave you two in case one would not be filled out correctly. Is that the idea? A. Yes, sir.

Q. Did he not tell you you had to execute it in duplicate?

A. I don't think he did. I am nearly sure, I think I am positive he did not. He really—I don't want to say any more.

Mr. WOODWORTH. (Addressing Mr. Pier.)—You have the statement of this lady at that hearing?

Mr. PIER.—There it is (handing).

Mr. WOODWORTH.—Does this record contain all the testimony?

Mr. PIER.—Yes, at least I am informed it does. That is as I understand it.

Mr. WOODWORTH.—The only thing I was anxious about is, I think the record does show that Mr. Watts did state to [49] this lady that she was entitled to be represented by counsel, but that was at the end of the hearing which she had. That is the only thing that I was anxious about.

The COMMISSIONER.—The testimony thus far has been that at the end of the first day's hearing—I assume from that there was a hearing on more than one day.

Mr. WOODWORTH.—I think there were two hearings. I think the record is sufficient. That is the testimony.

Mr. PIER.—As regards the facts on that ground

(Testimony of Laurent Lombard.)

you are willing to stand on the record on that matter?

Mr. WOODWORTH.—Yes. After the first hearing of these examinations, at the end of the first hearing they advise the party who has been arrested that she is entitled or he is entitled to have counsel.

The COMMISSIONER.—Your petitioner apparently denies that. She did not understand it.

Mr. WOODWORTH.—The petitioner did not understand it. She takes the position she was told it was not necessary to have an attorney, and acting on that she did not get an attorney. In spite of that fact it is true that the examining officer at Angel Island, after the first hearing, not at the very outset of the matter, but at the end of the hearing, after the petitioner has been subjected to all this examination, then advises the party they may have counsel if they see fit. That will raise another point as to due process of law, but I understand your Honor is not reporting that, but simply reporting the testimony that is all.

The COMMISSIONER.—Is the record introduced?

Mr. PIER.—I am going to introduce it in evidence. [50]

The COMMISSIONER.—Is there any question of the sufficiency of it as the official record of the department at Angel Island?

Mr. WOODWORTH.—I have not had a chance to peruse it. I presume it is a copy.

Mr. PIER.—The original is always sent to Wash-

(Testimony of Laurent Lombard.)

ington. There is always a copy kept here. This is the copy kept here.

Mr. WOODWORTH.—If that is a complete and accurate copy I have no objection to it.

Mr. PIER.—The only thing I find is not an absolute copy is, the certification of landing is merely a copy, and is not an original, so that the name of the official giving it is not signed to it. As I understand it this is the whole record as it has been given to me.

Mr. WOODWORTH.—I have had no opportunity to peruse it very carefully. I am satisfied to let it go in. If there is anything material I can call your Honor's attention to it.

The COMMISSIONER.—It is furnished you by the respondent as their full copy of the record in this case?

Mr. PIER.—Yes, as their full copy of the record in this case.

The COMMISSIONER.—I will admit it with that information I am not asked to return any of the evidence here. If the parties desire it I will send this record up with my report.

Mr. WOODWORTH.—I think that will be very satisfactory.

The COMMISSIONER.—Very well. I will mark the record Government's Exhibit No. 1.

(The record is marked "Government's Exhibit No. 1.") [51]

[Testimony of Paul Lohse, for the Government.]

PAUL LOHSE, called for the United States, sworn.

Mr. PIER.—Q. You are a French interpreter, are you?

A. I have interpreted for the Immigration office, yes, sir.

Q. And are employed by the Immigration officials at Angel Island to interpret in cases where a French interpreter is necessary? A. Yes, sir.

Q. Do you remember this case in which Alexandrine Roux was before the Immigration officials?

A. Yes, sir.

Q. And you did some interpreting there for the Immigration authorities in examining her, when Mr. Watts was conducting the examination?

A. Yes, sir.

Q. You have heard the testimony here this morning? A. Yes, sir.

Q. Was there anything said during that examination as to her employing counsel, or having a right to employ counsel?

A. Nothing during the examination, only at the end of it when Mr. Watts told her that she had been arrested by order of the Secretary of Commerce and Labor for being illegally in the country; that she was entitled to use a lawyer to defend her case; that the papers would be submitted to the lawyers, and that she could be released on a bond of \$1,000.

Q. Did you ever make any statement to her whatsoever that it was not necessary to employ counsel?

(Testimony of Paul Lohse.)

A. Not in my hearing.

Q. Did you make any other statement to her in reference to counsel other than is shown by the record? A. That is all.

Q. And you interpreted in French to the best of your ability the statement that was given by Mr. Watts to you to give to [52] her at the end of that examination, in reference to the employment of counsel? A. I did.

Q. Did she ask you any questions as to whether it would be necessary to employ an attorney, or not?

A. No, sir.

Q. Were you present when the daughter and Mr. Lombard came over, and called, and had a conversation with you? A. No, sir.

Mr. WOODWORTH.—No questions.

[Testimony of John A. Robinson, for the Government.]

JOHN A. ROBINSON, called for the United States, sworn.

Mr. PIER.—Q. You are an Immigration Inspector, and stationed at the port of San Francisco?

A. I am.

Q. And you had occasion to arrest this woman, Alexandrine Roux? A. I did.

Q. On a warrant issued by the Secretary of Commerce and Labor? A. Yes, sir.

Q. At the time you arrested her did you have any conversation with her? A. I did.

Q. This conversation was carried on in English, wasn't it? A. It was.

(Testimony of John A. Robinson.)

Q. State the substance of the conversation that you had with her.

A. I told her that I had arrested her on a telegraphic warrant issued by the Secretary of Commerce and Labor on the ground that she was illegally in the United States, she being employed in a house of prostitution, and told her she [53] could get on her coat and hat and come along with me. I asked her where she was living. She said she had a flat at 1428—I think it was 1428—Mason Street. I told her I would take her up to the house, and I would like to get whatever papers and letters she had. So she said she would come along with me. On our way up I asked her if she had not recently been on a trip to France. She said she had. I asked her when she returned, and she gave me the date. The record shows there. I think it was August, and she returned this year on the steamer “Chicago.” She gave me the name she returned under, Alexandrine Roux. Upon going to this flat she unlocked the door. We went upstairs, and she got out what papers and letters she had, and turned them over to me. There was a French girl asleep in bed, and I said, “Who is this girl?” She said, “That is a friend of mine.” I said, “This is not your daughter.” She said, “No, it is a French girl, just come from Portland, Oregon.” I said to this French girl, “Are you this woman’s daughter?” She said, “No.” I turned to Mrs. Roux, and said, “Where is your daughter?” She said “She works in a cloak house down on Grant Avenue, Cailleau’s,

(Testimony of John A. Robinson.)

I think she called it."

Mr. WOODWORTH.—Q. Armand Cailleau's?

A. I said, "You will have to take a few things along with you because you will have to stay at Angel Island a day or so before you get bonds." She asked what the bond was. I told her generally in these cases \$1,000; that she would have the privilege of putting up a bail bond, and she could find out on going to Angel Island what the bond was. I told her to take a few things with her that she might need over there, so she wrapped up a few personal effects, and I went down to [54] the Immigration office in the Appraisers' Building, and stopped there a few minutes, where I had another woman under arrest—my recollection is that I had another woman under arrest at that time,—and we then went down to pier 7, and I took her over to Angel Island.

Mr. PIER.—Q. Anything said about telephoning to her daughter?

A. She said she would like to telephone to her daughter. I asked if she had a telephone in the house. She said, "No." I said, "I won't have hardly time to get to the boat if we stop here, you can telephone from the Immigration office if you want to."

Mr. WOODWORTH.—Q. What day was this?

A. The date she was arrested—the record shows.

Q. The record shows when she was arrested?

A. Yes, sir.

The COMMISSIONER.—Q. Do you remember the day of the week? Have you any kind of recollection?

(Testimony of John A. Robinson.)

A. I had the record of the day she was arrested, and the day of the week.

Mr. WOODWORTH.—Q. You cannot recall it now. If it is in the record, all right.

A. It is in the record.

Mr. PIER.—That is all.

The COMMISSIONER.—Q. You told her she could telephone from the Immigration office?

A. If she wished to.

Q. That is in the Appraisers' Building?

A. In the new Custom House. I had no trouble in carrying on whatever conversation I wanted to with her in English. [55]

Q. Did she telephone?

A. No, she did not. My recollection is that that afternoon, or the following day her daughter came over with this gentleman here (pointing).

Mr. WOODWORTH.—Q. It was the same day?

A. Or the same day. They came over to see about bail.

The COMMISSIONER.—Q. Came over with the last witness?

A. Yes, sir, this young lady, and this gentleman (pointing).

Q. Which of those gentlemen?

A. This gentleman standing here (pointing). The one who stood up.

Q. The one who stood up is Mr. Lombard?

A. Yes, sir, they came into Mr. Watts' office, and they asked him. They said they wanted to see Mr. Watts in regard to giving bail for Mrs. Roux. I

(Testimony of John A. Robinson.)

immediately showed them to Mr. Watts' office, and a few minutes after he came out, and got two blank bail bonds.

Q. You did not hear any conversation between Mr. Watts and the lady? A. No, sir.

Cross-examination.

Mr. WOODWORTH.—Q. Mr. Robinson, you have never notified this lady, or advised her it was against the law to work in these places, and she would be in jeopardy by remaining here, did you?

A. No, sir, I had no instructions to notify her. The occupation is regarded as illegal in any instance in any of those houses.

Q. I know it is by virtue of a recent amendment. Didn't you notify some of these people—these people who were simply [56] employed as menials, or domestics in that capacity? A. No, sir.

Q. You have no such instructions? A. No, sir.

Q. You simply get information that they are so occupied, and apply to the department at Washington for a warrant? A. Yes, sir.

Q. And execute your warrant? A. Yes, sir.

Q. Through what source were you informed that this lady was working at this particular place as a cook?

A. I received it through private information.

Q. Do you consider it of a secret character?

A. Yes, sir.

Q. You do not care to disclose it? A. No, sir.

Q. I will not insist on it. You do not speak French, of course? A. No, sir.

(Testimony of John A. Robinson.)

Mr. WOODWORTH.—That is all.

Mr. PIER.—An attack has been made, if your Honor please, on remarks that Mr. Watts is said to have *been* made to these people. Mr. Watts is on his way east, his mother being on the point of death, at Washington. I do not believe it would be right to the Government to go on with the case without having Mr. Watts' testimony before the Court.

The COMMISSIONER.—Is the petitioner on bail?

Mr. WOODWORTH.—No, and that is the trouble. I will appeal to the courtesy and discretion of Mr. Pier, and these gentlemen, to let her out on bail, then we will not [57] object to the matter going over until the return of Mr. Watts.

(After some discussion.)

The COMMISSIONER.—In the capacity in which I am sitting I have no power to admit to bail. That must be done by the Judge of the District Court. While it is true that the petitioner is detained under a department warrant of deportation, and therefore to some extent in a position analogous to one who has been convicted of crime, it is also true that proceedings for a writ of Habeas Corpus contemplate summary action, and a prompt hearing and disposition of the matter. The testimony of Mr. Watts is, of course, material for the respondent, and his absence is sufficiently explained. This is the first case with which I am familiar, under the amended law which makes a cook in a house of prostitution liable to deportation. The case naturally appeals strongly to

the sympathies, and it is certainly true that if there is any likelihood of a writ being granted it would be an unnecessary hardship for her to be detained in confinement at Angel Island until the Government's case could be presented. In this view I will say that considering all the circumstances I shall hereafter grant a continuance of the hearing until such time as Mr. Watts returns, provided meanwhile she may have been admitted to bail by the competent court. If she is not admitted to bail, as I am at present advised, I will deny the request for a continuance.

For the time being, in order that you may present an application for bail, Mr. Woodworth, I will continue this hearing until Monday next, December 4th, at 1:30 in the afternoon, so that you may have an opportunity to apply to Judge De Haven. In applying to Judge De Haven, you are authorized [58] to express my views, if he cares to hear them.

(An adjournment is here taken until Monday, December 4th, 1911, at 1:30 P. M.)

Monday, December 4th, 1911.

(After discussion as to a continuance in consequence of the absence of Mr. Watts, Judge De Haven having refused to interfere as to the matter of bail, the following took place.)

The COMMISSIONER.—I am of opinion that I shall have to deny the motion for a continuance. I do it more readily for the reason that if it shall appear in the discretion of the Court, before whom the case is pending, that the missing testimony of Mr. Watts is desired in the matter, it can always, on mo-

tion of the United States Attorney, be re-referred to take that testimony. I do not feel that a proper ground is presented for a continuance, especially in a matter of so summary a nature as a petition for a writ of habeas corpus.

Have you any further testimony now?

Mr. PIER.—None, whatever. I will take an exception to your Honor's ruling. I have dictated an affidavit setting forth how Mr. Watts' testimony is material for the purpose of the record.

The COMMISSIONER.—You can state that now as an offer in support of the motion. I do not think it necessary to file an affidavit. [59]

Mr. WOODWORTH.—I will waive the filing of an affidavit to facilitate matters.

Mr. PIER.—The testimony of Mr. Watts, which I wish to introduce, is the testimony as to the conversation held between him and Miss Roux, and Mr. Lombard, at the time of their first visit to the Island, as to whether or not he advised them that it would be unnecessary to have an attorney in the case.

The COMMISSIONER.—Very well. Is there any further testimony that you wish to offer in this matter?

Mr. WOODWORTH.—Nothing at this time.

The COMMISSIONER.—The matter will be submitted.

A true transcript.

H. M. WRIGHT,
Sp. Referee & Examiner.

[Endorsed.] [60]

[Title of Court and Cause.]

Exceptions of Respondent to Report of Special Referee and Examiner.

Now comes Samuel W. Backus, Commissioner of Immigration at the port of San Francisco, California, respondent herein, and specifies his exceptions to the report of the Special Referee and Examiner on file herein as follows:

First: Respondent excepts to the order of the Special Referee and Examiner refusing to grant respondent a continuance in order that he might take the testimony of Mr. Watts who at the time of said hearing, was in Washington, District of Columbia.

Second: Respondent excepts to the finding that inspector Watts, in response to an inquiry made by Rosalie Roux and Mr. Lambard, as to whether it was necessary to obtain a lawyer, told them that "it was not necessary, that they should not bother, that the case did not amount to anything and all that was necessary was for them to bring two witnesses to the station for a further hearing, and in accordance with this statement, no lawyer was obtained."

Wherefore, respondent prays that this matter be re-referred to the Special Referee and Examiner with instructions to issue a commission to take the testimony of [61] Mr. Watts in Washington, District of Columbia.

Dated December 15, 1911.

ROBT. T. DEVLIN,
Atty. for Respondent.

[Endorsed.] [62]

At a stated term of the District Court of the United States for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday, the 19th day of December, in the year of our Lord one thousand nine hundred and eleven. Present: The Honorable WM. C. VAN FLEET, Judge.

[Title of Court and Cause.]

Order of Court Submitting Exceptions to Report of Commissioner.

On motion of Earl H. Pier, asst. U. S. atty., Marshall B. Woodworth, Esqr., attorney for petitioner herein, being present and consenting thereto, by the Court ordered that the Exceptions to the Report of the Special Referee and Examiner herein, be, and the same are hereby submitted to Judge De Haven, for determination upon points to be filed in two and two days. [63]

At a stated term of the District Court of the United States for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 8th day of January, in the year of our Lord one thousand nine hundred and twelve. Present: The Honorable R. S. BEAN, Judge.

[Title of Court and Cause.]

Order of Court Denying Petition for Writ.

This matter having been heretofore submitted to the Court for decision, now after due consideration

had thereon, the Court files its written opinion, and by the Court ordered that the Petition for a Writ of Habeas Corpus herein, be, and the same is hereby denied. [64]

[Title of Court and Cause.]

Memorandum Opinion Denying Writ.

DE HAVEN, District Judge.—Upon consideration of the evidence and the report of the referee herein I find that the petitioner was not denied the right to have an attorney to represent her in the proceedings before the Commissioner of Immigration at the port of San Francisco; and the petitioner was not denied the right to a full and fair hearing before said commissioner upon the charge of being an alien unlawfully in the United States, as set forth in the petition herein.

The Application for the Writ of Habeas Corpus is denied.

Further ordered that the order of this Court, heretofore made on November 28, 1911, requiring the Commissioner of Immigration at the port of San Francisco to retain said petitioner in his custody and within the jurisdiction of this Court until further ordered, is hereby continued in force until and including January 20th, 1912.

[Endorsed.] [65]

[Title of Court and Cause.]

Assignment of Errors.

Now comes Alexandrine Roux and files the following assignment of errors upon which she will rely on her appeal this day taken from the order and judgment made by this Court on the 8th day of January, 1912, denying the petition of said Alexandrine Roux for a Writ of Habeas Corpus.

I.

That the said District Court erred in denying the petition filed on behalf of the *said* for a Writ of Habeas Corpus.

II.

That the said District Court erred in not granting the said petition for a Writ of Habeas Corpus prayed for on behalf of the said Alexandrine Roux.

III.

That said District Court erred in not taking jurisdiction of said petition for a Writ of Habeas Corpus, and in not granting said Writ of Habeas Corpus, as prayed for in said petition.

IV.

That the said District Court erred in dismissing petition for the said Writ of Habeas Corpus.

V.

That your petitioner is restrained of her liberty [69] without due process of law in violation of the 14th amendment of the Constitution.

VI.

That the Commissioner of Immigration and Secretary of Commerce and Labor are and each is with-

out jurisdiction to imprison, detain or restrain of her liberty your said petitioner.

VII.

That the alleged order or warrant for the deportation from this country to France of your petitioner was and is without authority of law, without and in excess of jurisdiction, and null and void.

VIII.

That your petitioner was denied due process of law in this, that she was and is adjudged guilty of crime and ordered deported without any semblance of hearing or any hearing, and was denied the equal protection of the law to her guaranteed by the Constitution and Laws of the United States by the treaty existing between the United States of America and the Republic of France according to her the equal protection of law guaranteed to any subject of the most favored nation and also by the rules of regulations of the Department of Commerce and Labor now and then enforced.

IX.

That your petitioner was denied due process of law, the equal protection of the law, arrested, imprisoned and ordered deported from this country without being given the right to counsel to represent and defend her in every stage of the proceedings in violation of the fundamental right of personal liberty. [70]

X.

That your petitioner is arrested and ordered deported without due process of law, in this, the judgment of conviction and deportation was and is en-

tered against her without a fair or any hearing, without receiving or reproducing any evidence to support the charge alleged against her and by denying her constitutional right to be confronted by witnesses against her.

XI.

That your petitioner is not an alien or other immigrant and therefore not subject to any other provisions of the acts of Congress in that regard enacted.

XII.

That your petitioner is not subject to deportation and that she has resided within the United States more than three years continuously last past.

XIII.

That said District Court erred in not adopting the report and recommendation of the special referee, to whom the petition for a writ of habeas corpus was referred to take evidence.

XIV.

That said District Court erred in holding that the petitioner came within any of the classes of aliens who should be excluded and deported from the United States, in this that said evidence taken before said special referee fails to show that said petitioner comes within any of the classes of aliens who should be excluded from admission into the United States and who should be deported therefrom or [71] that said petitioner was an alien who was found to be an inmate of or connected with the management of a house of prostitution or practicing prostitution after said petitioner had entered the United States or who ever was, or now is, employed by, in, or in connection

with any house of prostitution.

MARSHALL B. WOODWORTH,
Attorney for said Petitioner.

[Endorsed.] [72]

[Title of Court and Cause.]

Stipulation Re Exhibits.

It is hereby stipulated and agreed that the Original Exhibits introduced in the above-entitled matter may be transmitted to the Clerk of the Circuit Court of Appeal for the Ninth Circuit to be used and made a part of the record on appeal in the above-entitled matter.

JOHN L. McNAB,
U. S. Attorney.

MARSHALL B. WOODWORTH,
Attorney for Appellant.

Dated: June 6th, 1912.

So ordered.

JOHN J. DE HAVEN,
Judge.

[Endorsed.] [79]

[Title of Court and Cause.]

**Order Extending Time to File Record in Circuit
Court of Appeals.**

Good cause appearing therefor, it is hereby ordered that the return day of the Citation heretofore issued herein be, and the same is hereby, enlarged thirty days from this date in order to permit the

Clerk of the above-entitled court to complete the transcription of the transcript of record on appeal in the above-entitled matter.

July 1, 1912.

JOHN J. DE HAVEN,
U. S. District Judge.

[Endorsed.] [80]

Certificate of Clerk to Transcript.

I, Jas. P. Brown, Clerk of the District Court of the United States of America, for the Northern District of California, hereby certify the foregoing and hereto annexed eighty (80) pages, numbered from 1 to 80 inclusive, together with one exhibit, transmitted under separate cover as per order of Court, contain a full, true and correct transcript of the record in the said District Court, in the matter of the Petition of Alexandrine Roux, for a Writ of Habeas Corpus, numbered 15,213, and which said transcript is made up in accordance with the instructions of Marshall B. Woodworth, Esq., Attorney for Petitioner and Appellant—see “Praecipe for Record on Appeal,” embodied in the Transcript herewith.

I further certify that the costs of preparing and certifying the foregoing Transcript of Appeal, is the sum of Forty-one Dollars (\$41.00), and that the same has been paid to me by the attorney for petitioner and appellant herein.

In witness whereof, I have hereunto set my hand

and seal of said District Court, this 31st day of July,
A. D. 1912.

[Seal]

JAS. P. BROWN,
Clerk.

[Endorsed]: No. 2164. United States Circuit Court of Appeals for the Ninth Circuit. Alexandrine Roux, Appellant, vs. The Commissioner of Immigration at the Port of San Francisco, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, First Division.

Filed July 31, 1912.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

[Title of Court and Cause.]

Stipulation as to Printing of Transcript on Appeal.

It is hereby stipulated and agreed that the title of the court and cause, except as to first paper filed in the proceeding, or any of the endorsements upon any of the papers to be printed, for the citation, petition and notice of appeal, bond on appeal, order allowing appeal, bond to appear, praecipe for record need not be printed in the transcript of record on appeal.

San Francisco, Cal., October 16, 1912.

JOHN L. McNAB,

United States Attorney.

MARSHALL B. WOODWORTH,

Attorney for Appellant.

[Endorsed]: 2164. In the Circuit Court of Appeals for the Ninth Circuit. Alexandrine Roux, Appellant, vs. Samuel W. Backus, Appellee. Stipulation as to Printing of Transcript on Appeal. Filed Oct. 16, 1912. F. D. Monekton, Clerk. Marshall B. Woodworth, Attorney for Appellant.

No. 2164.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

ALEXANDRINE ROUX,

Appellant,

vs.

SAMUEL W. BACKUS, Commissioner
of Immigration,

Appellee.

BRIEF ON BEHALF OF APPELLANT

MARSHALL B. WOODWORTH,
Attorney for Appellant.

Filed this.....day of.....A. D. 1912.

F. D. MONCKTON, Clerk.

By.....Deputy Clerk.

FILED

OCT 24 1912

No. 2164.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ALEXANDRINE ROUX,

Appellant,

VS.

SAMUEL W. BACKUS, Commissioner
of Immigration,

Appellee.

BRIEF ON BEHALF OF APPELLANT

STATEMENT OF THE CASE.

This is an appeal from the decision of the District Court of the United States in and for the Northern District of California (First Division), denying the application for a writ of *habeas corpus*.

The assignments of error which are relied upon raise two questions:

First. Whether the appellant had a full and fair hearing, it appearing that she had been advised by the immigration officials not to retain the services of an

attorney to defend her, upon which advice she acted, and did not have the advice or assistance of an attorney to defend her in the deportation proceedings, which resulted in her deportation;

Second. Whether a person, being an alien, who is employed in a house of prostitution purely in a menial capacity, such as a cook or chambermaid, and is not herself a prostitute and commits no act of prostitution in connection with her employment, comes within the meaning and intendment of Section 3 of the Act of February 20, 1907, as amended by the Act of March 26, 1910.

The warrant of deportation (Exhibit "A", attached to the return filed by the appellee in the court below) recites, as the cause of deportation:

"That the said alien is unlawfully within the United States in that she has been found *employed by, in, or in connection with a house of prostitution, or resort habitually frequented by prostitutes, or where prostitutes gather.*" (See Transcript of Record, p. 13)

The appellant sued out a petition for a writ of *habeas corpus*, and an order to show cause was issued thereon.

Upon the filing of the return, by the appellee, to the order to show cause, the learned Judge of the Court below referred the matter to a Special Referee and Examiner "to ascertain and report the facts on the issues "raised by the return filed to said order to show cause." (Transcript of Record, p. 14)

In due course of time the Special Referee and Examiner (Honorable H. M. Wright) filed his report which, in every way, was favorable to the appellant. (Transcript of Record, pp. ~~15-21~~)

The United States Attorney filed exceptions to said report as follows:

“First: Respondent excepts to the order of the Special Referee and Examiner refusing to grant respondent a continuance in order that he might take the testimony of Mr. Watts who at the time of said hearing, was in Washington, District of Columbia.

“Second: Respondent excepts to the finding that Inspector Watts, in response to an inquiry made by Rosalie Roux and Mr. Lambard, as to whether it was necessary to obtain a lawyer, told them that ‘it was not necessary, that they should not bother, that the case did not amount to anything and all that was necessary was for them to bring two witnesses to the station for a further hearing, and in accordance with this statement no lawyer was obtained.’

“Wherefore, respondent prays that this matter be re-referred to the Special Referee and Examiner with instructions to issue a commission to take the testimony of Mr. Watts in Washington, District of Columbia.” (Transcript of Record, p. ~~63~~)

The learned Judge of the Court below did not re-refer the matter, as prayed for by the appellee, but nevertheless denied the application for a writ of *habeas*

corpus and delivered the following memorandum opinion:

"Upon consideration of the evidence and the report of the Referee herein, I find that the petitioner was not denied the right to have an attorney to represent her in the proceedings before the Commissioner of Immigration of the port of San Francisco; and the petitioner was not denied the right to a full and fair hearing before said Commissioner upon the charge of being an alien unlawfully in the United States, as set forth in the petition herein. The application for the writ of *habeas corpus* is denied.

"Further ordered that the order of this Court, heretofore made on November 28, 1911, requiring the Commissioner of Immigration at the port of San Francisco to detain said petitioner in his custody and within the jurisdiction of this court until further order is hereby continued in force until and including January 20, 1912." (Transcript of Record, p 65)

From this decision the present appeal is prosecuted.

The facts involved in this controversy are not disputed by the United States Attorney, and they are so carefully and clearly epitomized by the Special Referee and Examiner that we make *his* Report *our* Statement of Facts, as follows:

"To the Honorable the Judges of the District Court of the United States, in and for the Northern District of California:

"Upon the return of an order to show cause in

the above-entitled matter the cause was, on December 1, 1911, referred to the undersigned as Special Referee and Examiner 'to ascertain and report the facts on the issues raised by the return filed to said order to show cause' A certified copy of said order of reference is annexed to this report.

"Accordingly I was attended on Saturday, December 2, 1911, by Marshall B. Woodworth, Esq., attorney for the petitioner, and Earl H. Pier, Esq., Assistant United States Attorney, for the respondent the United States Commissioner of Immigration at the Port of San Francisco. The parties were heard on said day and at the close thereof the Assistant United States Attorney requested a continuance of the hearing to procure the testimony of Immigration Inspector F. Watts, Jr., a material witness, who had been unexpectedly called to Washington, D. C., a few days prior to the hearing because of the serious illness of his mother. I thereupon continued the hearing until December 4, 1911, at 1:30 o'clock p. m., stating that I would grant a further continuance if in the interval the petitioner were ordered released on bail by the competent court. At the hearing on December 4, at the hour above named, it appearing that bail had been denied, I denied the motion for the further continuance and the cause was thereupon submitted. At the request of the attorney for the petitioner the proceedings were taken in shorthand by Clement Bennett, a competent and disinterested reporter, and were by him transcribed into typewriting. At the request of petitioner's attorney, though the same is not ordered to be done by the order of reference, I re-

turn herewith the said transcript of testimony duly authenticated as a true transcript by my signature upon the cover thereof. There was also introduced in evidence upon said hearing as Respondent's Exhibit 1 the immigration file containing a copy of the proceedings in the matter of said Alexandrine Roux before the respondent in the matter complained of in the petition, and this exhibit I likewise return with this report. Said transcript and said exhibit constitute all the evidence submitted at the hearing before me.

"It will be noted that the order of reference requires me to find only the facts, and not my conclusions of law. Since the important question upon such petition for a writ is whether or not the petitioner had a fair and full hearing, and since, in my view, the determination of that question is a matter of law depending upon a knowledge of the facts, I have, after consideration, determined that the best way in which I can fulfill the terms of the order to report the facts is to report not merely ultimate facts, but probative facts. The question of fact emphasized by the petitioner upon the hearing was whether she was allowed a full opportunity to be represented by counsel before the Department of Commerce and Labor.

"From the evidence submitted I find the following to be true:

"The petitioner Alexandrine Roux is a French woman who came to the United States from France about nine years ago, landing at New York and thence soon after proceeding to San Francisco. During said period of nine years she has resided in San Francisco except for a tempo-

rary visit to France upon business matters between April, 1911, the month of her departure, and August, 1911, the month of her return. During much of this period of residence she was employed as a cook at various houses of prostitution managed by French women in the said City of San Francisco. On October 19, 1911, respondent recommended that the Secretary of Commerce and Labor should issue his warrant for the arrest of one Josephine, true name unknown, upon information obtained through private undisclosed sources by Inspector Robinson, that the said Josephine had arrived from France about three months prior thereto and was then employed in a house of prostitution at 55 Bartlett Alley, San Francisco, as housekeeper and "acting madam", by which I understand an acting female manager in the business of prostitution. Accordingly on October 21, 1911, a telegraphic warrant of arrest was issued by the Acting Secretary of Commerce and Labor and a formal warrant was mailed the same day and received on October 27th, authorizing the arrest of the alien Josephine and another (surnames unknown) for a violation of the Act of Congress approved February 20, 1907, as amended by the Act approved March 26, 1910, upon the following charge: 'That the said aliens are unlawfully within the United States in that they have been found connected with the management of a house of prostitution; and that they have been found employed by, in or in connection with a house of prostitution or resort habitually frequented by prostitutes or where prostitutes gather.' On October 24, 1911, petitioner was arrested by Immigration Inspector Robinson. She stated to him that her name was not Josephine and that she had

never been called Josephine; that her name was Alexandrine Roux. The inspector stated that if it should be found that she was not the woman desired she would be immediately released. The petitioner was taken by Inspector Robinson to the Immigration Station on Angel Island and examined by Inspector Watts through an interpreter on the same day. Petitioner speaks very little English. At the close of the examination on said day she was instructed by Inspector Watts through an interpreter as follows: 'By order of the Secretary of Commerce and Labor in a telegram dated October 21, 1911, you have been arrested on the charge that you are an alien employed by, in, or in connection with a house of prostitution. You have the right to be represented by counsel and to see all the evidence against you. You will also be enlarged upon furnishing satisfactory bond in the sum of one thousand dollars. Do you desire to avail yourself of the right of counsel?' and the petitioner thereupon answered through the interpreter as follows: 'As soon as my friends come I will be able to decide.' *Later in the same afternoon petitioner's daughter Rosalie Roux, and a friend, Mr. Lambard, called in her behalf at the Immigration Station at Angel Island and had a conversation with Inspector Watts. They inquired of him the reason for the arrest and whether it was necessary to obtain a lawyer. Inspector Watts told them it was not necessary, that they should not bother, that the case did not amount to anything and all that was necessary was for them to bring two witnesses to the Station for a further hearing, and in consequence of this statement no lawyer was obtained. (Italics ours.)* He also advised them that she would be released upon

furnishing bail in the sum of one thousand dollars. Later they interviewed the petitioner. The petitioner testified that the interpreter took her aside and told her that it was not necessary to employ an attorney, but in view of the interpreter's contrary testimony before me I make no finding as regards any alleged communication to this purport by the Government interpreter to the petitioner. On or about October 26th the petitioner was released on bail. On October 30 petitioner appeared for a further hearing before Inspector Ainsworth with a different interpreter in attendance, and the testimony of petitioner and two witnesses in her behalf taken. On November 4, 1911, the respondent transmitted the record in the case with the recommendation that a warrant of deportation issue. In said letter of recommendation the Commissioner found that 'previous to her departure she was connected with the management of a house of prostitution and upon her return she continued that occupation.' On November 13, 1911, the Acting Secretary of Commerce and Labor issued his warrant of deportation on the grounds specified in the warrant of arrest.

"As regards the finding of the respondent transmitted to the Secretary of Commerce and Labor, I find that the petitioner was *not* at the time of her arrest or theretofore *connected with the management of a house of prostitution*, saving and excepting that at the time of her arrest and for three weeks prior thereto she had been *employed as cook and chambermaid at 55 Bartlett Alley, San Francisco, a house of prostitution. She did not live there, but resided in a flat of her own with her daughter at 1842 Mason Street, San Francisco.*

She is not and never has been a prostitute or woman of immoral character, and was not at the time of her arrest or at any time prior thereto connected with the management of a house of prostitution, but she was at the time of her arrest employed in a house of prostitution as cook and chamber-maid as above set forth. (Italics ours.) Petitioner testified under objection that she was not aware that her occupation was contrary to law. I find furthermore that her name is not Josephine and that at no time has she been known by that name.

"I deem it proper to add to the above statement of facts my impression of the witnesses offered at the hearing. *I have no reason to doubt the credibility of petitioner or of her witnesses.* (Italics ours.) She is an ignorant French woman, a widow, about 40 years of age, whose most evident thought and desire at the hearing before the respondent was to prove that she was an "honest woman." She has two daughters, one in France and the other living with her here, who appeared before me. The latter is a young woman of respectable appearance and modest demeanor, aged about 18 years, who is and for some time last past has been employed as a dressmaker in this city in the establishment of Armand Cailleau, a merchant dealing in ladies' gowns and the like. Mr. Lambard, the other witness, is a clerk at the Emporium whose appearance was also favorable. Neither the petitioner or her witnesses impressed me as of the class likely to associate with prostitutes, and the nature of her occupation is to be explained partly by her unfamiliarity with English, partly by the higher wages which she testified were paid her in

disreputable houses, and partly by the peculiar attitude of the people of her class and nationality toward associations considered by us to be unworthy. The witnesses for the Government, Inspector Robinson and Mr. Lohse, impressed me as truthful, but I noticed with regard to Mr. Lohse's interpretation a tendency to allow the witness to talk at length before disclosing his interpretation and in such interpretation to give apparently his conclusions as to the substance of what was said in French by the witness.

"Respectfully submitted this 12th day of December, 1911.

"H. M. WRIGHT,
"Special Referee and Examiner."
(Transcript of Record, pp. 15-21)

This report was strongly in favor of the appellant, and a résumé of the essential facts applicable to this appeal is as follows:

(1) That the appellant is not a prostitute, but was employed as a cook and chambermaid in a house of prostitution;

(2) That she did not live in the house of prostitution, but lived in a flat of her own with her daughter at 1842 Mason Street.

(3) That she is a woman of respectability and of good moral character, as is also her young daughter, and that they both work for a living.

(4) That the appellant is an ignorant French

woman, who speaks very little English, and who was not aware that her occupation was contrary to law.

(5) That the appellant and her witnesses are persons of credibility.

(6) That the appellant was first examined privately, at the close of which examination she was then informed of her right to be represented by a lawyer, to which she replied: "As soon as my friends come I will be able to decide";

(7) That subsequently, on the same day, appellant's daughter and a friend, by the name of Mr. Lambard, called in behalf of appellant at the Immigration Station at Angel Island and had a conversation with Inspector Watts. "They inquired of him the reason for the arrest and whether it was necessary to obtain a lawyer. Inspector Watts told them it *was not necessary, that they should not bother, that the case did not amount to anything and all that was necessary was for them to bring two witnesses to the Station for a further hearing*, and in consequence of this statement no lawyer was obtained."

(8) That the appellant was arrested as being a woman named Josephine, whereas her name was never Josephine and at no time had she been known by that name.

It is to be noted by this Honorable Court, in its consideration of the case, that the recommendation of the Commissioner of Immigration to the Secretary of

Commerce and Labor, to the effect: "That previous
 " to her departure she was connected with the *manage-*
 " *ment* of a house of prostitution and upon her return
 " she *continued* that occupation," was not concurred in
 or followed by the Secretary of Commerce and Labor,
 for the warrant of deportation issued by the Acting
 Secretary of Commerce and Labor, on November 13,
 1911, specifies particularly the ground of deportation
 as follows:

"That said alien is unlawfully within the Uni-
 ted States in that she has been found *employed by,*
in, or in connection with a house of prostitution,
or resort habitually frequented by prostitutes, or
where prostitutes gather." (Transcript of Rec-
 ord, pp. 12-13)

Had the appellant been ordered deported for being
 found "connected with the management of a house of
 prostitution," the warrant of deportation would have
 so recited, as that is made the very first ground or
 cause of deportation in Section 3 of the Act of Febru-
 ary 20, 1907 (34 Stats., 898), as amended by the Act
 of March 26, 1910. (36 Stats., 263.)

That Act, as amended, so far as relevant to this
 case, reads:

"*Any Alien, who shall be found an inmate of*
or connected with the management of a house of
prostitution or practicing prostitution after such
 alien shall have entered the United States, or who
 shall receive, share in, or derive benefit, from any
 part of the earnings of any prostitute; *or who is*

employed by, in, or in connection with any house of prostitution or music or dance hall, . . . shall be deemed to be unlawfully within the United States and shall be deported in the manner provided by Sections twenty and twenty-one of this Act."

The appellant was ordered deported, as already pointed out, under the latter clause and not under the first clause of this particular portion of Section 3 of the Act as amended.

The Special Referee and Examiner found specially "that the petitioner was *not* at the time of her arrest or "theretofore *connected* with the *management* of a "house of prostitution," but that she had been employed as a cook in a house of prostitution. (Transcript of Record, p. 20)

In this regard, the finding of the Acting Secretary of Commerce and Labor, as set out in the warrant of deportation, agrees with the finding of the Special Referee and Examiner.

We believe that the above statement of the case is sufficiently broad clearly to apprise this Honorable Court of the questions of law raised on the present appeal.

ARGUMENT.

FIRST POINT.

DID APPELLANT GET A FULL AND FAIR HEARING WHEN IT APPEARS THAT SHE WAS INDUCED, THROUGH THE ADVICE GIVEN BY THE IMMIGRATION INSPECTOR, NOT TO ENGAGE AN ATTORNEY, AND SHE DID NOT HAVE THE ASSISTANCE OR ADVICE OF AN ATTORNEY TO DEFEND HER, BUT WAS TOLD BY THE IMMIGRATION INSPECTOR THAT "IT WAS NOT NECESSARY, THAT THEY SHOULD NOT BOTHER, THAT THE CASE DID NOT AMOUNT TO ANYTHING AND ALL THAT WAS NECESSARY WAS FOR THEM TO BRING TWO WITNESSES TO THE STATION FOR A FURTHER HEARING," AND THAT IN CONSEQUENCE OF THESE STATEMENTS THE APPELLANT DID NOT RETAIN AN ATTORNEY, AND WAS ORDERED DEPORTED? (Transcript of Record, p. 19.)

It is elementary law (using the language of the Supreme Court of the United States, in the recent case of *Low Wah Suey vs. Backus, etc.*, see advance sheets Supreme Court Reporter, issue of July 15, 1912, vol. 32, p. 734) :

"That Congress may pass laws forbidding aliens or classes of aliens from coming within the United States and may provide for the expulsion of aliens or classes of aliens from its territory, and may devolve upon the Executive Department or subordinate officials the right and duty of identifying and arresting such persons, is settled by pre-

vious decisions of this court.” (Citing *Wong Wing v. United States*, 163 U. S. 228, 237.)

But it is equally well settled that the hearing before the Executive Department or subordinate officials must be “fairly conducted.”

As is aptly and appositely stated by the Supreme Court of the United States in the case of *Low Wah Suey vs. Backus etc., supra*:

“A series of decisions in this Court has settled that such hearings before executive officers *may* be conclusive *when fairly conducted*. In order to successfully attack by judicial proceedings the conclusions and orders made upon such hearings it must be shown that the proceedings were *manifestly unfair*, that the action of the executive officers were such as *to prevent a fair investigation* or that there was a *manifest abuse of the discretion* committed to them by statute.” (Citing *United States v. Ju Toy*, 198 U. S. 253; *Chin Yow v. United States*, 208 U. S. p. 8; *Tan Tun v. Edsell*, 223 U. S. 673.) (Italics ours.)

In the case at bar, we contend that “the proceedings were manifestly unfair,” “that the action of the executive officers were such as *to prevent a fair investigation*,” and “that there was a *manifest abuse of discretion*.”

We contend that the proceedings were “manifestly unfair” to appellant, in being advised not to have an attorney; “that it was not necessary, that they should “not bother, *that the case did not amount to anything*,

“and all that was necessary was for them to bring two “witnesses to the Station for a further hearing,” in consequence of which statements no attorney was obtained.

We contend that the action of the Immigration Inspector was such “as to prevent a fair investigation.”

We contend that the undisputed facts established by the record in this case show a “manifest abuse of the discretion” committed to the immigration officials, in giving such advice to an alien person threatened with so serious a result as that of deportation.

The latest rules issued by the Department of Commerce and Labor (Rules of November 15, 1911, pp. 36-39), provide certain procedure to be followed on “ARREST AND DEPORTATION ON WARRANT.”

These rules are intended for the protection of aliens arrested and prosecuted for deportation.

Rule 22, clauses (b) and (c) of subdivision 4 provides:

“(b) During the course of the hearing the alien shall be allowed to inspect the warrant of arrest and all the evidence on which it was issued; and *at such stage thereof as the officer before whom the hearing is held shall deem proper, he shall be apprised that he may thereafter be represented by counsel* and shall be required then and there to state whether he desires counsel or waives the same, and his reply shall be entered on the rec-

ord. *If counsel be selected, he shall be permitted to be present during the further conduct of the hearing, to inspect and make a copy of the minutes of the hearing, so far as it has proceeded, and to offer evidence to meet any evidence theretofore or thereafter presented by the Government. Objections and exceptions of counsel shall not be entered on the record, but may be dealt with in an accompanying brief.*

“(c) At the close of the hearing the full record shall be forwarded to the Bureau, together with any written argument *submitted by counsel* and the recommendations of the examining officer and the officer in charge for determination as to whether or not a warrant for deportation shall issue.”

In the case at bar, appellant, owing entirely to the advice given by the Inspector, was unrepresented by counsel.

She was informed that “they should not bother, that the case did not amount to anything.”

She was further advised by the Inspector “all that was necessary was for them to bring two witnesses to the Station for a further hearing.”

In consequence of this advice, appellant did not retain an attorney to defend her, and she complied with the request of the Inspector and brought two witnesses to the Station, and, having religiously followed the advice of the Inspector, was nevertheless ordered deported.

After having been ordered deported she employed the services of an attorney and sued out a petition for a writ of *habeas corpus*, which resulted in the present appeal.

In order the more thoroughly to appreciate the force of our objection, as to the want of fairness in the proceedings which resulted in the deportation of the appellant, an explanation of the manner in which these warrants of arrest are issued and the steps thereafter taken against one arrested for deportation is highly important.

This is nowhere better pictured than by District Judge Holt, in the case of *United States etc. vs. Williams*, 185 Fed. Rep. 598, 599. Says the learned Judge:

“In actual practice the usual procedure is as follows: There are a number of officers called inspectors of immigration, connected with the office of the commissioner. Complaint that an alien is in this country in violation of law is usually made by one of these inspectors. The information upon which he bases the charge may have been obtained by himself upon investigation, or may have been furnished to him by others. Frequently such information is furnished by the city police, or by enemies of the person charged, acting through malice or revenge. Affidavits are obtained and are sent by the inspector to the Secretary at Washington, who, if he thinks a proper case is made out, issues a warrant for the arrest of the persons charged. This warrant is usually

intrusted for execution to the inspector who has made the charge, and he subsequently usually takes entire charge of the case. After the aliens have been taken to Ellis Island, they are held in seclusion and not permitted to consult counsel until they are first examined by the inspector, under oath, and their answers taken by a stenographer. After this preliminary inquisition has proceeded as far as the inspector wishes, the aliens are then informed that they are entitled to have counsel, and to give any evidence they wish in respect to the charge. Thereafter a further hearing is had before the inspector, at which further evidence may be given by him, and the aliens may appear by counsel and offer evidence in their own behalf. The inspector thereupon reports whether in his opinion guilt has been established, and the evidence taken and the inspector's findings are sent to the Secretary of Commerce and Labor at Washington, who thereupon makes an order either for the deportation or the release of the aliens. *It is, of course, obvious that such a method of procedure disregards almost every fundamental principle established in England and this country for the protection of persons charged with an offense.* The person arrested does not necessarily know who instigated the prosecution. He is held in seclusion, and is not permitted to consult counsel until he has been privately examined under oath. *The whole proceeding is usually substantially in control of one of the inspectors, who acts in it as informer, arresting officer, inquisitor, and judge.* The secretary who issues the order of arrest and the order of deportation is an administrative officer who sits hundreds of miles away, and never hears or sees the person proceeded against or the

witnesses. *Aliens, if arrested, are at least entitled to the rights which such a system accords them; and, if they are deprived of any such right, the proceeding is clearly IRREGULAR, AND ANY ORDER OF DEPORTATION ISSUED IN IT INVALID."*

This authority is more directly applicable to the facts in the case at bar than any other we have been able to find.

It was there held that where aliens are prevented by undue influence or intimidation from exercising their right to be represented by counsel, the proceedings are *fatally irregular*, and the alien is entitled to his *absolute discharge on habeas corpus*.

We think that the rationale of that decision will prove controlling of the case at bar. The facts, in a general way, are somewhat similar to those in the case at bar; that is, there was in the case cited, as in the case at bar, the fact that the alien was first formally informed by the inspector of the right to have counsel and thereafter the suggestion was thrown out that "It would be better for them not to have counsel" (see *U. S. vs. Williams*, 185 Fed. Rep. 598, 602). In these respects, the case cited and the case at bar are substantially similar; although in the case cited the undue influence exercised was more continuous and persistent, amounting practically to intimidation, whereas the undue influence practiced in the case at bar was limited to the one occasion where, after having been formally informed of the right to have counsel, and the alien replying that: "As soon as my friends come I will be

able to decide," the inspector told them that "it was not
 "necessary (to have a lawyer), that they should not
 "bother, *that the case did not amount to anything* and
 "all that was necessary was for them to bring two wit-
 "nesses to the station for a further hearing."

Acting upon these suggestions, emanating from so important an official source, and considered by the appellant and her friends as made in absolute good faith and as thoroughly reliable, the appellant did not engage the services of an attorney and was unrepresented by a lawyer throughout the entire proceedings, which resulted in her deportation.

To show the applicability, upon the general proposition, of the case cited to the case at bar, we take the liberty of quoting a few excerpts.

Says the learned Judge in that case:

"There is no doubt that they (the aliens) were formally informed by the commissioner and by Tedesco that they had a right to have counsel, and I have no doubt that they told Commissioner Williams, and that he believed, that they did not want counsel. The charge is that Tedesco was *constantly suggesting to them that it would be better for them not to have counsel*, sometimes in effect making them believe that he would take umbrage at their having any counsel, and that the Secretary at Washington, when he came to review the record, would be prejudiced against them if he found that they had taken counsel."

United States vs. Williams, 185 Fed. Rep. 598,
 602.

After discussing the facts presented in that case, the learned Judge continues (at p. 603) :

"The weightiest proof in the case is the fact itself that these aliens did repeatedly refuse to retain counsel. They were aliens in humble circumstances. They knew nothing of American law or of the practice in deportation cases. Their native language was French. Mr. Bosny speaks English fairly well and Mrs. Bosny very poorly. They had been arrested and taken from their home to Ellis Island. They were charged with being engaged in a disgraceful business. They were to be tried on that charge, and, if convicted, they would be deported. If deported, they would be liable to two years imprisonment if they ever attempted to re-enter the country. Is it conceivable that any person under such circumstances should refuse legal assistance, unless some strong influence was at work to dissuade them from accepting it?"

The learned Judge concluded his elaborate opinion as follows (see p. 604) :

"My conclusion is that these aliens by the influence of the inspector who was hearing their case were dissuaded and intimidated from exercising their right to be represented by counsel; that the proceedings therefore were fatally irregular; that the Secretary's order of deportation based upon them is therefore invalid, and their present detention under such order illegal. I direct that the petitioners be discharged."

In all frankness to this Honorable Court, we do not

claim that the Inspector in the case at bar "intimidated" the appellant from retaining the services of an attorney to defend her; but we do most stoutly maintain that the Inspector, by his suggestions and statements, "dissuaded" the appellant from having the benefit of the advice and assistance of an attorney. Whether it was "dissuasion" or "intimidation" is immaterial. One is just as bad as the other in the eyes of the law and either is equally reprehensible. In fact, any ruse, artifice, improper suggestions, or undue influence practiced upon an alien, arrested for deportation, the result of which is to induce the alien not to hire an attorney to represent her in deportation proceedings, or to dissuade her from doing so, is, we respectfully submit, highly improper and robs the alien of that full and fair hearing which the law and the decisions of the courts guarantee. Especially is that true where the alien, as in the case at bar, is an ignorant woman, whose occupation is of a menial character, and who speaks and understands English but little.

Applying the rationale of the decision in the case of *United States vs. Williams, supra*, to the facts developed in the case at bar, it is incomprehensible to us how the learned Judge of the Court below could hold that appellant had a "fair and full hearing."

Here is an ignorant, illiterate foreigner—a woman—whose occupation is that of a cook—one who speaks and understands but little English. She is arrested by the Immigration Inspector. She is kept in

seclusion and not allowed to see her friends—not even her own daughter—or to consult an attorney. She is examined secretly by an Inspector with the assistance of an interpreter. At the end, *and not at the beginning*, of this star-chamber examination, she is informed what she is arrested for in the following words:

“By order of the Secretary of Commerce and Labor in a telegram dated October 21, 1911, you have been arrested on the charge that you are an alien employed by, in, or in connection with a house of prostitution. *You have the right to be represented by counsel and to see all the evidence against you.* You will also be enlarged upon furnishing satisfactory bond in the sum of \$1000. *Do you desire to avail yourself of the right of counsel?*”

And the appellant thereupon answered, through the interpreter, as follows:

“As soon as my friends come I will be able to decide.”

Later in the same afternoon appellant's daughter and a friend, Mr. Lambard (a gentleman of repute in San Francisco and connected with the Emporium for several years), called in her behalf at the Immigration Station at Angel Island and had a conversation with the Inspector. They inquired of him the reason for the arrest and whether it was necessary to obtain a lawyer. The Inspector thereupon told them that “It was not necessary, *that they should not bother, that the case did not amount to anything and that all that*

"was necessary was for them to bring two witnesses to the Station for a further hearing."

In consequence of these statements on the part of the Inspector no lawyer was obtained.

Placing absolute reliance in the good faith of the Government officer and of the value of his suggestions and advice, these unsuspecting and credulous people do not engage an attorney; they rely implicitly upon the Inspector's statement that there is nothing to the charge; and follow his instructions to bring over two witnesses at the final hearing.

The result is what? Banishment!

The appellant was undoubtedly lured and lulled into a sense of fancied security by the advice and suggestions, gratuitously made, of the Inspector.

Had she had an experienced attorney, one conversant with Federal practice and the laws and procedure relating to the enforcement of the Immigration Acts, she would have been advised immediately, and at the outset, of the seriousness of the charge and of the imperative necessity of satisfying the Inspector *primarily*, and the Secretary of Commerce and Labor at Washington *ultimately*, of the fact that she did not come within the inhibited classes; she would have been informed that the burden of proof was practically upon her to establish her innocence; she would have been fully advised as to her rights and the char-

acter of proof required in this class of cases in order to obtain a cancellation of the warrant of arrest.

But she had, and was given, no such advice or assistance. On the contrary, she was "dissuaded" from getting the benefit of legal advice and assistance by the suggestions and statements made by the Inspector.

Under the rules she was entitled to have an attorney "to inspect the warrant of arrest and all the evidence on which it was issued."

Who performed that all-important function for the appellant? No. one.

Under the rules she was entitled to have an attorney "to be present during the further conduct of the hearing."

Who was present at the further hearings to protect appellant's rights? No one.

Under the rules such attorney could "offer evidence "to meet any evidence theretofore or thereafter presented by the Government?"

Was any evidence presented on behalf of appellant? None at all.

It is true that, in accordance with the suggestion of the Inspector, two witnesses were produced, as the Inspector had stated that that was all that was necessary. The appellant complied with this suggestion and yet we are confronted with the cold and cruel fact appear-

ing in the record that the recommendation of the Commissioner was *adverse* to the appellant, resulting in her deportation. Evidently the testimony of the two witnesses was considered of no value.

The rules further provide that "at the close of the hearing the full record shall be forwarded to the Bureau, together with any written argument submitted by counsel and the recommendation of the examining officer and the officer in charge for determination as to whether or not a warrant for deportation shall issue."

Was any written argument on behalf of appellant sent to Washington to offset the adverse recommendations? None.

In other words, it must be plain to this Court that appellant, in following the suggestions and advice of the Inspector, unwittingly placed herself at the mercy of the immigration officials.

She was told not to bother about getting a lawyer, "*that the case did not amount to anything.*"

And yet, we find that the recommendation is adverse to her; *and not only adverse*, but it was sought to convict and brand her of being *actually connected* with the *management* of a house of prostitution, an offense entirely different from the one upon which she was arraigned before the Inspector, and one much more odious than that of being a mere menial employee in such a place.

Really, the facts developed in this case would seem to justify us in claiming that the appellant was grossly deceived for the very purpose of securing her deportation. She was certainly lured into a sense of security. She was told, in one breath, that there was nothing in the charge against her and not to bother about retaining the services of a lawyer, and yet, in the very next breath, we find that the recommendation is not only adverse to her but upon a much more serious and odious charge and different from the one upon which she was arraigned.

Can this be called "justice"? Can it be called "due process of law"? Is this a "fair and full hearing"? Will such proceedings be tolerated by this appellate tribunal?

The language used in the case of *United States vs. Redfern*, 180 Fed. 500, would seem to be peculiarly appropriate:

"Congress has seen fit to vest the final decision as to the right of aliens to enter the country in the Department of Commerce and Labor, but that department is governed by certain rules and regulations which must be *strictly construed* in conformity with the *eternal principles of justice and right*."

"It is fundamental in American jurisprudence that every person is entitled to a fair trial by an impartial tribunal."

Can it be said, in the case at bar, that appellant had a "fair trial by an impartial tribunal"? Had the pro-

ceedings in her case been "strictly construed in conformity with the eternal principles of justice and right," would she have been lured and lulled into a fancied security by the Inspector, that there was nothing to the charge made against her, and that she needed no attorney to defend her, and then have an adverse recommendation against her, of which she was oblivious until the warrant of deportation was served upon her?

It does seem to us that the proceedings before the immigration officials were not conducted "in conformity with the eternal principles of justice and right," but, fairly construed, would seem rather to be a perversion thereof.

The mere fact, as will be contended by the United States Attorney in his brief, that the appellant was formally informed of her right to have counsel at the close of her first preliminary examination, when she was examined alone and with the assistance of an interpreter, does not relieve the case of its embarrassing features. Had the Inspector stopped there and abstained from the suggestions and advice which he gave a few hours later, it might well be claimed that he had satisfied the demands and requirements of the law and of the rules. But he was not content with informing the appellant, in a perfunctory way, of her right to have counsel. He thereafter went much further, and practically nullified what he had previously stated to appellant about her right to have counsel, by stating that:

"It was not necessary (to have a lawyer), that they should not bother, that the case did not amount to anything and all that was necessary was for them to bring two witnesses to the Station for a further hearing."

It is these later suggestions and statements by the Inspector which are vicious and objectionable, in consequence of which the appellant did not retain an attorney, and was ordered deported, and was deprived of a fair and full hearing.

THE GUILT OR INNOCENCE OF THE APPELLANT NOT MATERIAL IN THIS PROCEEDING.

As was said in the case of *United States vs. Williams*, 185 Fed. Rep. 598, 604:

"The question of the guilt of the aliens is strictly not material in this proceeding."

In the case at bar, the petition for a writ of *habeas corpus* does not, and could not, seek a re-trial or review of the facts presented to the executive department.

United States vs. Ju Toy, 198 U. S. 253;
Chin Yow vs. United States, 208 U. S. 8;
Tan Tun vs. Edsell, 223 U. S. 673.

But the petition for a writ of *habeas corpus* does raise the question as to whether the appellant had a "full and fair hearing," and this Honorable Court, as we claim the lower Court should have done, will look into the record to determine from the facts there pre-

sented whether the appellant did have a fair and full hearing in being deprived of the advice and assistance of an attorney. That is the only question presented to the Court by this phase of the case, not whether the appellant is guilty or innocent of the charge, but whether she had a "*full and fair hearing*." If this Honorable Court should conclude that she did not have that "full and fair hearing," which the law and the rules and the decisions guarantee to an alien arrested on a warrant of deportation, then the proceedings were "*fatally irregular*"; and the Secretary's order of deportation based upon them is therefore *invalid*; and the present detention of appellant under such order *illegal*; and she is entitled to her *absolute discharge*, as was held in the case of *United States vs. Williams*, 185 Fed. Rep. 598, 604.

Should this Honorable Court take our view of this case, for which we have confidently argued in the preceding pages, a judgment of reversal must result, with instructions to the lower Court to grant the issuance of the writ of *habeas corpus* and thereupon to discharge the appellant from custody.

In this event it will not be necessary for this Honorable Court to consider the second point raised by us, which relates to an interpretation of Section 3 of the Act of February 20, 1907, as amended by the Act of March 26, 1910.

SECOND POINT.

IS A MERE MENIAL EMPLOYEE, WHO IS HERSELF NOT A PROSTITUTE AND DOES NOT COMMIT ANY ACTS OF PROSTITUTION IN CONNECTION WITH HER EMPLOYMENT AS A MENIAL SERVANT IN A HOUSE OF PROSTITUTION, WITHIN THE INHIBITION OF SECTION 3 OF THE ACT OF FEBRUARY 20, 1907, AS AMENDED BY THE ACT OF MARCH 26, 1910?

We contend that a mere menial employee, such as a cook (which was the occupation of appellant in the house of prostitution), does not come within the spirit and intent of Section 3 of the Act of February 20, 1907, as amended by the Act of March 26, 1910.

The warrant of deportation (exhibit "A" attached to the Return of the appellee) recites:

"That the said alien is unlawfully within the United States in that she has been found employed by, in, or in connection with a house of prostitution, or resort habitually frequented by prostitutes, or where prostitutes gather."

Section 3 of the Act of February 20, 1907 (34 Stats. 898), as amended by the Act of March 26, 1910 (36 Stats. 263), so far as it is applicable to the case at bar, provides:

"Any alien * * * who is employed by, in, or in connection with any house of prostitution or music or dance hall or other place of amusement

or resort habitually frequented by prostitutes, or where prostitutes gather, * * * shall be deemed to be unlawfully within the United States and shall be deported in the manner provided by Sections Twenty and Twenty-one of this Act."

It is not to be claimed by the Government that a decent alien man or woman, who happens to be employed by a house of prostitution to do work which is decent and respectable, such as a cook or chambermaid or dressmaker, etc., is subject to deportation under the above statute.

This statute undoubtedly means that an alien woman, who is hired or employed by a house of prostitution to carry on the trade of prostitution, in the sense of being employed for that purpose, shall be subject to deportation.

Indeed, that seems to have been the view and intention of Congress, when it amended Section 3 of the Act of February 20, 1907, by the amendatory Act of March 26, 1910. Attention is called to the debates on the floor of the House of Representatives when the amendment was before that body for consideration. (See Congressional Record, vol. 45, part 1, pp. 517-530, 545-551, 804-823.)

There seems to have been a great deal of controversy as to whether or not certain provisions of the Act were within the police power of the various states, and throughout the entire arguments it will be seen that the trend of the House of Representatives was to pro-

hibit the importation of women into the United States *for purposes of prostitution*. In connection with that portion of the Act which particularly affects the appellant, a serious question arose in Congress as to whether or not the various states were not being deprived of the police powers guaranteed them by the Constitution. In these debates, numerous decisions were quoted and are to be found on pages 522, 523, 524 and 525 of volume 45 of the Congressional Record, part 1.

We contend that it was not the intention of Congress to affect alien women employed in houses of prostitution merely as servants or domestics and not committing any acts of prostitution themselves. We contend that mere servants and domestics are not within the spirit of the law. In support of this contention, we quote the following from the Congressional Record, vol. 45, part 1, page 549:

“Mr. Richardson: Then, inasmuch as you mentioned the lottery cases in support of this bill, I will say that a member of the Supreme Court stated that a lottery ticket *per se* was wicked of itself. You do not pretend to say a woman is wicked of herself?

“Mr. Hayes: I do not; but I pretend to say that prostitution is, but I cannot stop to argue the matter out with this gentleman.

“Mr. Richardson: Then if a woman comes here, that is virtuous, what are you going to do with her?

“Mr. Hayes: *This bill does not propose to do anything with her, and it cannot be so construed by any reasonable construction.*”

Without enlarging upon this second point, we respectfully submit that Section 3, as amended, was never intended to apply to the case of alien women employed in houses of prostitution, merely as servants or domestics; that it applies only to that class of women who are employed by, in, or in connection with a house of prostitution for *purposes of prostitution or immorality*.

We respectfully submit that, upon either or both grounds urged, the judgment of the Court below, denying the issuance of the writ of *habeas corpus*, should be reversed, and the Court below directed to issue the writ prayed for and to discharge the appellant and permit her to go hence without day.

Respectfully,

MARSHALL B. WOODWORTH,
Attorney for Appellant.

No. 2164.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

ALEXANDRINE ROUX,

Appellant,

VS.

SAMUEL W. BACKUS,

Commissioner of Immigration,

Appellee.

BRIEF ON BEHALF OF APPELLEE.

JOHN L. McNAB,

United States Attorney,
Attorney for Appellee.

Filed this.....day of January, 1913.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk

FILED

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EXPLANATION OF THE RECORD.

The printed transcript contains only the proceedings before the Master on a reference, together with the Master's report and a transcript of the files. It does not contain the original proceedings had before the immigration authorities looking to the deportation of the appellant. By stipulation of counsel, the entire transcript from the Immigration Department is filed in the case, and reference to the same is made as a part of the record.

STATEMENT OF THE CASE.

The appellant was charged by an Immigration Inspector with a violation of that portion of section 3 of the Immigration Act of February 20th, 1907 (34 Stats. 898), as amended by the Act of March 26th, 1910 (36 Stats. 263), which declares that

“Any alien . . . who is employed by, in, or in connection with any house of prostitution or music or dance hall or other place of amusement or resort habitually frequented by prostitutes or where prostitutes gather, . . . shall be deemed to be unlawfully within the United States, and shall be deported,” etc.

The evidence as to the occupancy of a house of the proscribed character and for the purposes forbidden by the Act, is without dispute. The detained woman herself testified at the hearing “I have always worked in houses of prostitution because the wages are a good deal higher than in other places and I needed the money.” (See examination by Inspector Ainsworth, Immigration Transcript.)

Furthermore, the illegality of her occupation seems to have been admitted by Mr. Woodworth, her counsel, at the trial. (Tr. p. 59.)

ANSWER TO FIRST POINT.

APPELLANT EXPRESSLY ADMITTED HER
GUILT AND WAS GIVEN THE “FAIR

HEARING" REQUIRED BY LAW, HAVING BEEN INFORMED AT THE ORIGINAL HEARING BY THE IMMIGRATION INSPECTOR, OF HER RIGHT TO COUNSEL, AND AGAIN INFORMED BEFORE THE SECOND HEARING CLOSED, OF HER RIGHT TO PRESENT FURTHER EVIDENCE. A STATEMENT MADE BY AN INSPECTOR ASIDE FROM THE EXAMINATION, DOES NOT DESTROY THE FAIR HEARING REQUIRED BY LAW. FURTHERMORE, THE EVIDENCE IS IN CONFLICT AS TO THE TRUTH OF THE CHARGE THAT SHE WAS ADVISED THAT NO COUNSEL WAS NECESSARY.

FACTS UNDER FIRST POINT.

The appellant was taken before Inspector Watts and at the conclusion of the original hearing before him, she was notified that she was entitled to inspect the record and was further entitled to be represented by counsel at all stages. The only evidence that she was advised by an Inspector that an attorney was not necessary, relates to a time subsequent to the conclusion of the original hearing before the Inspector. That testimony on behalf of the appellant is disputed.

The extent of the appellant's testimony is, that through interpreter Paul Lohse, she was informed

that there was no necessity for having a lawyer (Tr. p. 31). This is sharply contradicted by Lohse when he was called as a witness. (Tr. pp. 54, 55.) The testimony of the other witnesses on behalf of the appellant consists of evidence given by the daughter (Tr. p. 27) to the effect that she asked Mr. Watts if it was necessary to get a lawyer, and that he replied in the negative, and that given by L. Lombard (Tr. p. 47) as to a similar conversation with Mr. Watts. John A. Robinson, Immigration Inspector, testified that he was present and heard no such conversation. (Tr. pp. 58, 59.) The reason that Mr. Watts' testimony was not taken is shown on page 60 of the Transcript. The government made a showing that Mr. Watts was then on his way East to visit his mother who was lying at the point of death. A discussion arose as to admitting the appellant to bail pending a continuance. Appellant's counsel applied to Judge De Haven by a writ of habeas corpus who after reviewing the evidence, filed his opinion (Tr. p. 65), holding that the petitioner "was not denied the right to a full and fair hearing before said Commissioner," and therefore no further proceedings were had relative to the testimony of Mr. Watts.

During the hearing, it was admitted by appellant's counsel that the records showed that appellant had been advised of her right to counsel. (Tr. pp. 51, 52.)

Subsequent to all of these proceedings, another and further hearing was had before Inspector Ainsworth. (See original record on file.) Witnesses were then heard on behalf of the appellant and she was asked subsequently whether there was anything further that she desired to present. These witnesses were merely to the effect that she was a reputable woman.

The record shows expressly that the appellant admitted all of the facts charged by the government, namely, that she had always worked in notorious houses as charged, because the wages were higher than those paid elsewhere. (See original record on file.)

ARGUMENT.

The record shows strict and regular adherence to the rules of practice in the Immigration Department.

The appellant was properly advised of her rights.

The only testimony upon which an unfair hearing is based, relates to proceedings entirely outside the record, all of which testimony is sharply contradicted.

It seems entirely improbable that an Inspector who had nothing to do with arresting this appellant, and who was merely called in to conduct a hearing in which he had no interest other than as a govern-

ment official, should advise a witness unofficially, that she did not require counsel when he had already advised her officially that she was entitled to counsel. There is not the slightest evidence that any attempt was made to prevent appellant or her friends from securing an attorney. On the second hearing she was called before a different Inspector who conducted the final hearing in the manner required by law. The only question that presents itself to the Court is this: It being admitted that the record correctly shows that the appellant was properly advised of her right to counsel, would an unofficial statement of an Inspector that counsel was probably not necessary, constitute an unfair hearing where the appellant admits that the charge made by the government is true?

Appellant relies upon the case of *United States vs. Williams*, 185 Fed. 598. I have personally examined the syllabus of every case relating to aliens decided since that decision was reported. No reference is anywhere made to it on any point appertaining to this case. The decision must stand upon its own facts. Considered with relation to its facts, it has no application whatever to the matter now before the Court. There, there was evidently a studied effort on the part of the inspectors to deliberately prevent an attorney who desired to see the appellants, from conversing with his clients. There were also repeated efforts to prevent the clients

communicating with any attorney. Reference is made to the fact that the inspector who made the arrest, was conducting the proceeding. The inspector, Tedesco, in the language of the Court "was constantly suggesting to them that it would be better for them not to have counsel, sometimes in effect making them believe that he would take umbrage at their having any counsel." There is nothing in these facts relevant to the discussion before the Court. These witnesses were properly warned of their rights; absolutely no effort was made to prevent them from seeing an attorney; they were given every opportunity to present evidence in their behalf; no intimidation was attempted, and there was not the slightest effort by appellant at any time to produce a single fact showing that the appellant was not strictly and fully a person within the excluded class.

Much high-sounding language is indulged in in the appellant's brief to the effect that eternal principles of justice and right should govern these hearings. I agree with counsel that the appellant is entitled to a fair hearing, but I can see absolutely nothing in the proceedings before the Commissioner which in any way denies her that hearing. If the cause were to be reversed on the ground urged, it would be equivalent to saying that a defendant who has frankly admitted her guilt, is entitled as a matter of technical right, to have a case reversed

because some one not connected with the hearing, told her that it was not necessary to have an attorney appear and plead guilty for her.

A MENIAL EMPLOYED IN THE PROSCRIBED BUSINESS, IS WITHIN THE MEANING OF THE ACT, BUT THE FINDING OF THE IMMIGRATION AUTHORITIES UPON THE QUESTION AS TO WHETHER AN ALIEN IS WITHIN THE EXCLUDED CLASS, IS CONCLUSIVE AND NOT SUBJECT TO REVIEW BY THE COURT.

The language of section 3 of the Immigration Act as amended in 1910, is sufficiently clear. It places in the excluded class, any person "who is employed by, in or in connection with" any of the proscribed places. That the woman in question was employed in and about such a place, is admitted. It is settled law in this country, to quote the language of Mr. Justice Whitney in

Zakonaite vs. Wolf, U. S. Sup. Ct., decided
December 2, 1912,

that,

"It is entirely settled that the authority of Congress to prohibit aliens from coming within the United States and to regulate their coming includes continued liberty of the alien to reside within the bounds of this country may be made to depend; that a proceeding to enforce such regulations is not a criminal prosecution within

the meaning of the Fifth and Sixth Amendments; *that such an inquiry may be properly devolved upon an executive department or subordinate officials thereof, and that the findings of fact reached by such officials, after a fair though summary hearing, may constitutionally be made conclusive, as they are made by the provisions of the act in question.* Fong Yue Ting v. United States, 149 U. S. 698, 730; United States v. Zucker, 161 U. S. 481; Wong Wing v. United States, 163 U. S. 228, 237; Turner v. Williams, 194 U. S. 279, 289; Chin Yow v. United States, 208 U. S. 8, 11; Tang Tun v. Edsell, 223 U. S. 673, 675; Low Wah Suey v. Backus, 225 U. S. 460, 468."

It has several times been decided that where the immigration authorities give the hearing required by the statute, their finding that an alien is within the excluded class is conclusive, and cannot be reviewed by the courts.

Prentis vs. Cosmas, 196 Fed. 372;

Ex parte Pouliot, 196 Fed. 437.

This has been even extended so far as to decide that a finding by the Immigration authorities upon the question of citizenship itself, is binding upon the courts.

United States vs. Ju Toy, 198 U. S. 258;

Haw Moy vs. North, 183 Fed. 89.

There was abundant evidence before the Court to show that the appellant was within the excluded

class and it would matter not how much evidence to the contrary were produced. If there was any evidence before the Immigration officials on the question, their decision is conclusive.

Frick vs. Lewis, 195 Fed. 694.

It is respectfully submitted that the hearing was fair and that the writ should be denied.

Respectfully submitted,

J. McNAB,
United States Attorney.

